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EDITOR'S NOTE

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o. 85-227-CSY
tatus: GRANTED

Title: Despina Smalis and Ernest Smalis, Petitioners
v.
Pennsylvania

ocketed:
ugust 9, 1985

Court: Supreme Court of Pennsylvania,
Western District

Counsel for petitioner: Chase,Norma

Counsel for responoent: Eberhardt,Robert L.

ntry	Date	Note	Proceedings and Orders
1	Aug 9 1985	G	Petition for writ of certiorari filed.
3	Sep 9 1985		Order extending time to file response to petition until October 8, 1985.
4	Oct 7 1985		Brief of respondent Pennsylvania in opposition filed.
5	Oct 9 1985		DISTRIBUTED. November 1, 1985
6	Nov 4 1985		Petition GRANTED.
			**********
7	Dec 17 1985	G	Motion of petitioners to dispense with printing the joint appendix filed.
8	Dec 17 1985		Record filed.
10	Dec 20 1985		Order extending time to file brief of petitioner on the merits until December 30, 1985.
11	Dec 30 1985		Brief of petitioners Despina Smalis, et al. filed.
12	Dec 30 1985		Brief amicus curiae of ACLU, et al. filed.
13	Jan 13 1986		Motion of petitioners to dispense with printing the joint appendix GRANTED.
14	Jan 18 1986	D	Motion of petitioners for divided argument filed.
16	Jan 27 1986		Order extending time to file brief of respondent on the merits until February 10, 1986.
17	Feb 4 1986		SET FOR ARGUMENT, Wednesday, April 2, 1986. (1st case)
18	Feb 8 1986		Brief of respondent Pennsylvania filed.
19	Feb 11 1986		CIRCULATED.
20	Feb 11 1986	X	Brief amicus curiae of United States filed.
21	Feb 10 1986	G	Motion of National District Attorneys Association, et al. for leave to file a brief as amici curiae filed.
22	Feb 24 1986		Motion of petitioner Ernest Smalis for divided argument DENIED. Justice Brennan would grant this motion.
23	Jan 14 1986	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
24	Mar 3 1986		Motion of National District Attorneys Association, et al. for leave to file a brief as amici curiae GRANTED.
25	Mar 3 1986		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
26	Mar 26 1986	X	Reply brief of petitioners Despina Smalis, et al. filed.
27	Apr 2 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

85-227

IN THE

SUPREME COURT OF THE UNITED STATES

DESPINA SMALIS and ERNEST SMALIS,

Petitioners

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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139pp

QUESTION PRESENTED FOR REVIEW

Does the Double Jeopardy Clause permit a prosecution appeal from a ruling, made on defense motion at the close of the prosecution's case in a nonjury trial, that the evidence is insufficient as a matter of law to prove guilt?

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OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is published at 490 A. 2d 394. The en banc opinion of the Superior Court of Pennsylvania is published at 331 Pa. Super. 307, 480 A. 2d 1046.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered March 29, 1985; reargument was denied on June 11, 1985. Your Honorable Court has jurisdiction to review said judgment by writ of certiorari by virtue of the Act of June 25, 1948, c. 646, §1, 62 Stat. 928, 18 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which provides:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . .

STATEMENT OF THE CASE

Petitioners, husband and wife, were jointly charged with criminal homicide (two counts), recklessly endangering another person (two counts), causing catastrophe, and failure to prevent catastrophe. Petitioner Despina Smalis was also charged with securing execution of documents by deception. The charges arose out of a fatal fire that occurred February 12, 1979 in a building owned by petitioners.

Nonjury trial began on November 12, 1980 in the Court of Common Pleas of Allegheny County, Pennsylvania. At the close of the Commonwealth's case both petitioners demurred to the evidence. On December 19, 1980 the trial court sustained the demurrers with respect to murder, voluntary manslaughter, and causing catastrophe, finding, as the Supreme Court of Pennsylvania subsequently stated, that "as a matter of law . . . there was insufficient evidence to link the defendants to the setting of the fire." 490 A. 2d at 396, 3a infra. Demurrer was denied as to the remaining charges.

The Commonwealth appealed to the Superior Court of Pennsylvania from the orders sustaining the demurrers, and also sought reconsideration of the orders. The trial court granted reconsideration

but reaffirmed its original orders on January 8, 1981. The Commonwealth then appealed from the reaffirmance of the orders. The court, by order entered January 9, 1981, granted a Commonwealth motion to stay further proceedings on the remaining charges pending disposition of the appeals. The Superior Court consolidated the appeals.

Petitioner Despina Smalis filed a Motion to Quash Appeal in that court on February 17, 1981, contending that appellate review was barred by the Double Jeopardy Clause. On May 11, 1981 the court denied the motion without prejudice to petitioner's right to argue appealability in her brief. Both petitioners raised the double jeopardy issue at the briefing stage. Although the briefs are not part of the record, the panel decision acknowledges "Appellees

argue that the appeal is barred by the Double Jeopardy Clause of the United States Constitution." 72a-73a infra. That decision, rendered on July 8, 1983, agreed with petitioners and quashed the appeals on double jeopardy grounds. The Commonwealth successfully sought reargument, which resulted in a court en banc decision, entered on June 29, 1984, affirming the panel's decision to quash.

The Commonwealth then filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania. The court granted the petition and consolidated the case with another one before it, Commonwealth v. Zoller, wherein the Superior Court had rendered a decision (reported at 318 Pa. Super. 402, 465 A. 2d 16) quashing a Commonwealth appeal on the basis of the panel decision in

the instant case. After briefing and argument, the court, by decision rendered March 29, 1985, reversed the Superior Court decisions quashing the appeals, remanded the instant case to the Superior Court for consideration of the merits of the appeals, and remanded the Zoller case to the Court of Common Pleas of Beaver County, Pennsylvania for a new trial, the Superior Court having found that the order sustaining the demurrer in that case was erroneous before it found that double jeopardy barred the appeal. Petitioners filed an Application for Reargument, which the court denied on June 11, 1985.

REASONS FOR GRANTING THE WRIT

The issue presented by this case is whether the Supreme Court of Pennsylvania erred in holding that a defendant who, in Pennsylvania parlance, "demurs to the evidence" at the close of the prosecution's case and secures a discharge on the basis that the evidence is insufficient to prove guilt has "elect[ed] to seek dismissal on grounds unrelated to his factual guilt or innocence" (490 A. 2d at 401, 26a-27a infra and that appellate review of the insufficiency determination is accordingly permitted by United States v. Scott, 437 U.S. 332, 98 S. Ct. 2187, 57 L. Ed. 2d 642 (1978).

The court thus upheld Pennsylvania's longstanding rule permitting the Commonwealth to appeal from orders sustaining defense challenges to the

sufficiency of the evidence at the close of the Commonwealth's case. The rule was established sub silentio by Commonwealth v. Parr, 5 Watts & Sergeant 345 (1843), rationalized on the theory that such appeals present only a question of law in Commonwealth v. Kolsky, 100 Pa. Super. 596 (1930), and, prior to the Superior Court panel decision in the instant case, had last been reexamined in a brief dictum in Commonwealth v. Heller, 147 Pa. Super. 68, 29 A. 2d 340 (1942), twenty-seven years before Benton v. Maryland, 394 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969) applied the Double Jeopardy Clause to the states. See generally Strazzella, Commonwealth Appeals and Double Jeopardy, Pennsylvania Law Journal-Reporter, Vol. IV, Nos. 39-40, October 19 and 26, 1981.

The sum and substance of the opinion

below is that the Scott reference to "factual guilt or innocence" (id. at 87, 98 S. Ct. at 2191, 57 L. Ed. 2d at 71; emphasis added) and the definition of an acquittal in United States v. Martin Linen Supply Company, 430 U.S. 564, 571, 97 S. Ct. 1349, 1355, 51 L. Ed. 2d 642, 651 (1977) as a "resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged" (emphasis added) reflect a constitutional distinction between insufficiency determinations based on considerations of credibility or weight of evidence and insufficiency determinations that are reached as a matter of law. A decision falling into the latter category, according to the opinion, is "'not on the merits'" in that it presents a question of law, not fact (490 A. 2d at 400, 22a-23a infra)

and thus, supposedly, is reviewable. The opinion appears to attach some significance to the fact that the sufficiency challenge was made at the close of the Commonwealth's case rather than at the close of all the evidence in the form of a motion for judgment of acquittal. N. 5, 6, 490 A. 2d at 400, 401, 23a, 27a infra.

Petitioners respectfully submit that the position of the Supreme Court of Pennsylvania is utterly untenable in light of the equal applicability of the prohibition of consideration of credibility or weight of evidence to District Court determination of a sufficiency challenge under Federal Rule of Criminal Procedure 29, Burks v. United States, 437 U.S. 1, 16, 98 S. Ct. 2141, 2150, 57 L. Ed. 2d 1, 13 (1978), in light of the observation in Martin Linen, n.

8 at 571, 97 S. Ct. at 1354, 51 L. Ed. 2d at 650, that the earliest stage at which a Rule 29 motion may be made, the close of the government's case, "obviously arises well after jeopardy has attached," in light of the holding of Martin Linen that the label applied to a decision does not determine whether or not it is an acquittal, id. at 571, 97 S. Ct. at 1354-55, 51 L. Ed. 2d at 651, in light of the statement in Martin Linen that judgments under Rule 29 are to be treated uniformly and that judgments under 29(c) are as final as those under 29(a) and 29(b), id. at 575, 97 S. Ct. at 1356, 51 L. Ed. 2d at 653, in light of the holding of Scott that an acquittal may consist of a not guilty verdict "or . . . a ruling by the court that the evidence is insufficient to convict," Scott at 91, 98 S. Ct. at 2194, 57 L.

Ed. 2d at 74 (emphasis added), and in light of the holding of Sanabria v. United States, 420 U.S. 54, 77-78, 98 S. Ct. 2170, 2185-86, 57 L. Ed. 2d 43, 62-63 (1978) that a defendant's challenge to the sufficiency of the evidence is not a waiver of double jeopardy rights.

Quite simply, no constitutional distinction exists between a not guilty verdict and a judicial determination that not guilty is the only possible verdict, and the Supreme Court of Pennsylvania erred in concluding otherwise.

The court noted that the Pennsylvania practice upon reversal of an order sustaining a demurrer has been to remand for a new trial. The court thus avoided establishing different rules for appealability of demurrer orders entered in jury trials and those entered in

nonjury trials; petitioners, however, anticipate a Commonwealth argument that the Pennsylvania rule can be salvaged by limiting it to bench trials and limiting proceedings after reversal to resumption of trial. Petitioners take the position that either retrial or resumption of bench trial offends the Double Jeopardy Clause. United States v. Jenkins, 420 U.S. 358, 95 S. Ct. 1006, 43 L. Ed. 2d 250 (1975). In Jenkins Your Honorable Court held that "further proceedings . . . [on remand] . . . devoted to the resolution of factual issues going to the elements of the offense charged", id. at 370, 95 S. Ct. at 1013, 43 L. Ed. 2d at 259, constitute resumption of jeopardy and noted its continued rejection of an aspect of Mr. Justice Holmes' theory of "continuing jeopardy" that would have permitted a

contrary conclusion. Scott, petitioners believe, left this part of Jenkins intact. Scott, supra, n. 6 at 90, 98 S. Ct. at 2193, 57 L. Ed. 2d at 65. In Justices of Boston Municipal Court v. Lydon, ___ U.S. ___, 104 S. Ct. 1805, 1814, 80 L. Ed. 2d 311, 325 (1984) the "continuing jeopardy" concept was, for the first time, endorsed by a majority of Your Honorable Court, but the decision made clear that an acquittal still terminates jeopardy and thus refrained from embracing that aspect of the concept that the Jenkins court had rejected.

Petitioners also anticipate an alternative argument of "manifest necessity" from respondent, but deem it sufficient at this juncture to note that the manifest necessity doctrine is a limitation of the right of a defendant to have his guilt or innocence

determined by the tribunal first impaneled, United States v. Perez, 22 U.S. 579, 9 Wheat. 579, 6 L. Ed. 2d 165 (1824) and not a limitation of the right of a defendant not to be placed back in jeopardy after an acquittal, and that the mistrial analogy that would accordingly be essential to the invocation of the doctrine was expressly rejected in Martin Linen, supra, at 570, 97 S. Ct. at 1354, 57 L. Ed. 2d at 650.

While the possibility exists that remand to the Superior Court would result in affirmance of the acquittal, the case is clearly ripe for review in that the decision below was a final disposition of the double jeopardy claim. Cox Broadcasting Company v. Cohn, 420 U.S. 469, 482-83, 95 S. Ct. 1029, 1040, 43 L. Ed. 2d 328, 342 (1975); Harris v. Washington, 404 U.S. 55, 92 S. Ct. 183,

30 L. Ed. 2d 212 (1971).

The decision goes beyond mere misapplication of constitutional principles to the facts of a particular case. It perpetuates a rule that deprives Pennsylvania defendants of the benefit of Martin Linen and Sanabria. While the rule has not been codified, the policy considerations that make review on appeal a matter of right when the highest court of a state rejects a challenge to the constitutionality of a legislative or judicial enactment, Lathrop v. Donohue, 367 U.S. 820, 81 S. Ct. 1826, 6 L. Ed. 2d 1191 (1961), militate in favor of review of this case by writ of certiorari. The case is an appropriate one for summary disposition.

Petitioners accordingly pray that a writ of certiorari be granted, that the judgment of the Supreme Court of

Pennsylvania be vacated, and that the order of the Superior Court of Pennsylvania quashing the appeals of the Commonwealth be reinstated.

Respectfully submitted,

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Thomas A. Livingston, Esquire
Attorney for Petitioner Ernest Smalis

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

JOHN ZOLLER,
Appellee

No. 26 W.D. Appeal Dkt. 1984

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

DESPINA SMALIS, a/k/a PEPE SMALIS,
Appellee

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

ERNEST SMALIS, a/k/a ANASTASIOS SMALIS,
Appellee

No. 62 W.D. Appeal Dkt. 1984

OPINION

NIX, C. J.

March 29, 1985

We are here called upon to consider the broad question as to the applicability

of the Double Jeopardy Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment,[1] upon a trial court order granting a defendant's motion to terminate the trial in his favor before verdict. Specifically, the issue raised is whether our procedure which permits a trial court's order sustaining a demurrer to the Commonwealth's evidence to be reversed on appeal, allows a new trial where the order was erroneously entered. For the reasons that follow we are satisfied

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[1]In recent years the United States Supreme Court has made its interpretations of the double jeopardy clause applicable to the States under the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). As we suggested in Commonwealth v. Klobuchir, 486 Pa. 241, 405 A. 2d 881 (1979), Article I §10 of our Constitution affords protection co-extensive with that afforded under the federal double jeopardy clause. Id at 254, n. 12, 405 A. 2d at 887-88, n. 12. See also Commonwealth v. Hude, 492 Pa. 600, 613, 425 A. 2d 313, 320 (1980). Thus a separate discussion of our interpretation under Article I §10 is unnecessary.

that our procedure does not offend double jeopardy.

I.

This appeal concerns two consolidated cases, Commonwealth v. Smalis, 331 Pa. Super. 307, 480 A. 2d 1046 (1984) and Commonwealth v. Zoller, 318 Pa. Super. 402, 465 A. 2d 16 (1983), both of which ended when the trial judge, sitting in a non-jury trial, granted defendant's demurrers to the prosecution's case. In Smalis defendants were charged with two counts of murder by arson. After the prosecution presented its evidence, the trial court found as a matter of law that there was insufficient evidence to link the defendants to the setting of the fire and sustained defense demurrers. The Commonwealth appealed. A panel of the Superior Court analogized the demurrer to an acquittal, and quashed

the appeal on double jeopardy grounds. On reargument, en banc, the Superior Court affirmed the panel's decision.

Similarly, in Commonwealth v. Zoller, supra, the trial court determined that the evidence did not establish the element of general criminal intent and sustained defense demurrers to charges of aggravated assault, simple assault, recklessly endangering another person and criminal conspiracy. On appeal, the Superior Court found that the trial court erred when it sustained the motions for demurrer, but concluded that it was unable to grant the Commonwealth any relief in light of its earlier ruling in Commonwealth v. Smalis, supra.

II.

Double jeopardy has been recognized as having three separate and distinct objectives; the protection of the

integrity of a final judgment, the prohibition against multiple prosecutions even where no final determination of guilt has been made and the proscription against multiple punishment for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969). The question of multiple punishments for the same offense is not implicated in the instant appeals and therefore need not require our attention. We are called upon to examine the first two objectives to determine whether they are in any way offended by a redetermination of the trial courts' decisions to grant the motion for demurrer.

A.

The notion of the sanctity of the finality of a judgment in a criminal case developed from the common-law pleas

of autrefois acquit, autrefois convict, and pardon which required a final judgment of guilt or innocence by the finder of fact. The most frequent articulation of this theory has been " . . . that the State with all of its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense. . . . " United States v. Scott, 437 U.S. 82, 86, 98 S. Ct. 2187, 2191, 57 L. Ed. 2d 65 (1978), quoting Green v. United States, 355 U.S. 184, 187-88, 78 S. Ct. 221, 223-24, 2 L. Ed. 2d 199 (1957). Under this approach, the protection of the rule applies only after a defendant has been convicted or acquitted - after the complete disposition of the action against him. Crist v. Bretz, 437 U.S. 28, 33, 98 S. Ct. 2156, 2159, 57 L. Ed. 2d 24 (1978). However, this concept has not

been interpreted as an absolute foreclosure of review of a judgment of the trial court in its disposition of criminal cases. United States v. Wilson, 420 U.S. 332, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975); United States v. Ball, 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 (1896). Thus we must examine the federal precedent to ascertain those factors which determine when the trial judgment is to be given the cloak of finality precluding further review.

The key question in the examination of this aspect of the double jeopardy protection is what is considered a final determination of guilt or innocence for this purpose. Interestingly, the concept of finality was never interpreted as precluding review of the entry of judgment in a criminal case by way of appeal. Rather, the focus was on the second

prosecution which was deemed offensive.

> In the course of the debates over the Bill of Rights, there was no suggestion that the Double Jeopardy Clause imposed any general ban on appeals by the prosecution. . . . Nor does the common-law background of the Clause suggest an implied prohibition against state appeals. Although in the late 18th century the King was permitted to sue out a writ of error in a criminal case. . . . , the principles of autrefois acquit and autrefois convict imposed no apparent restrictions on this right. It was only when the defendant was indicted for a second time after either a conviction or an acquittal that he could seek the protection of the common-law pleas. The development of the Double Jeopardy Clause from its common-law origins thus suggests that it was directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial.
>
> United States v. Wilson, 420 U.S. 332, 342, 95 S. Ct. 1013, 1021, 43 L. Ed. 2d 232 (1975).

This concept of the protection intended to be afforded by the Double Jeopardy Clause is clearly reflected in the U.S. Supreme Court's articulation of the central design of the guarantee:

> " . . . [to] protect an individual from being subjected to the hazard of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty."

Green v. United States, supra, 355 U.S. at 187-88, 78 S. Ct. at 223-24 (1957). See also, Bullington v. Missouri, 451 U.S. 430, 445, 101 S. Ct. 1852, 1861, 68 L. Ed. 2d 270 (1981); United States v. DiFrancesco, 449 U.S. 117, 127, 101 S. Ct. 426, 432, 66 L. Ed. 2d 328 (1980); United States v. Scott, supra, 437 U.S. at 95, 98 S. Ct. at 2196; Crist v. Bretz, supra, 437 U.S. at 35, 98 S. Ct. at 2160; Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141, 2147, 57 L. Ed. 2d 1 (1978); Arizona v. Washington, 434 U.S.

497, 504 n. 13, 98 S. Ct. 824, 829 n. 13, 54 L. Ed. 2d 717 (1978); United States v. Martin Linen Supply Company, 430 U.S. 564, 569, 97 S. Ct. 1349, 1353, 51 L. Ed. 2d 642 (1977); United States v. Dinitz, 424 U.S. 600, 606, 96 S. Ct. 1075, 1079, 47 L. Ed. 2d 267 (1976); Serfass v. United States, 420 U.S. 377, 387-88, 95 S. Ct. 1055, 1061-63, 43 L. Ed. 2d 265 (1975); United States v. Wilson, supra, 420 U.S. at 353, 95 S. Ct. at 1027; United States v. Jorn, 400 U.S. 470, 479, 91 S. Ct. 547, 554, 27 L. Ed. 2d 543 (1971).[2]

Following this approach it has been

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[2]Where a defendant has once been tried, convicted and punished for a particular crime, the same principles of fairness and finality require that he not be subject to further trial and punishment for the same offense where retrial is sought by the prosecution. United States v. Wilson, 420 U.S. 332, 343, 95 S. Ct. 1013, 1022, 43 L. Ed. 2d 232 (1975); Ex Parte Lange, 85 U.S. 163, 172, 176, 18 Wall. 163, 172, 176, 21 L. Ed. 872 (1873).

firmly established where review would not subject the defendant to a second trial, a trial order favoring a defendant could be appealed without offending double jeopardy. United States v. Morrison, 429 U.S. 1, 97 S. Ct. 24, 50 L. Ed. 2d 1 (1976) (per curiam) (Double jeopardy does not bar prosecutorial appeal from trial court order applying retroactively an appellate suppression ruling subsequent to the entering of a guilty verdict in a bench trial.) Successful appeal from the post-verdict suppression ruling would merely result in reinstatement of a guilty verdict rather than a retrial or "further proceeding . . . devoted to the resolution of factual issues going to the elements of the offense charged." United States v. Wilson, 420 U.S. 332, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975). An exception to the rule that denies the state the

opportunity to appeal from an acquittal is where the judgment of acquittal is entered by a trial court following a jury verdict of guilty. No retrial is required because the original verdict can be reinstated. Cf. United States v. Martin Linen Supply Company, 430 U.S. 564, 569-70, 97 S. Ct. 1349, 1353-54, 51 L. Ed. 2d 642 (1977) (prosecution is precluded by double jeopardy bar from appealing from a directed verdict - acquittal following a hung jury).

B.

Our inquiry must now turn to when appellate review is permissible where the grant of a second trial is required to remedy the asserted claim of error. Although double jeopardy is a right afforded to protect the defendant, it is interesting to note that originally it was thought that a new trial was

unavailable after appeal, whether requested by the prosecution or the defendant. See United States v. Gibert, 25 F. Cas. 1287 (C.C.D. Mass. 1834) (No. 15, 204) (Story, J.). However, this position was altered in United States v. Ball, 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 (1896), when the Supreme Court "made clear that a defendant could seek a new trial after conviction, even though the Government enjoyed no similar right." United States v. Wilson, supra, 420 U.S. at 353, 95 S. Ct. at 1027. Two considerations have been identified as being the basis for this holding. "First, the Court has recognized that society would pay too high a price were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in proceedings leading to conviction",

United States v. Tateo, 377 U.S. 463, 466, 84 S. Ct. 1587, 1589, 12 L. Ed. 2d 448 (1964). See also Burks v. United States, 437 U.S. 1, 15, 98 S. Ct. 2141, 2149, 57 L. Ed. 2d 1 (1978). Second, the Court also recognized that retrial after reversal of a conviction initiated by the defendant was not the type of governmental oppression targeted by the double jeopardy clause.[3] United States v. Scott, supra, 437 U.S. at 91, 98 S. Ct. at 2194; Tibbs v. Florida, 457 U.S. 31, 40, 102 S. Ct. 2211, 2217, 72 L. Ed. 2d 652 (1982).

In a similar vein, double jeopardy

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[3]The Supreme Court has reasoned that when an appeal is successful, the appellant has either "waived" his plea of former jeopardy or, alternatively, that the original jeopardy is "continued" since the first conviction was not final. Green v. United States, 355 U.S. 184, 189, 78 S. Ct. 221, 224, 2 L. Ed. 2d 199 (1957).

has been held not to require the prohibition of reprosecution where the defendant moves for a mistrial. Oregon v. Kennedy, 456 U.S. 667, 102 S. Ct. 2083, 2089, 72 L. Ed. 2d 416 (1982); United States v. Scott, supra, 437 U.S. at 93, 98 S. Ct. at 2195; Lee v. United States, 432 U.S. 23, 30, 97 S. Ct. 2141, 2145, 53 L. Ed. 2d 80 (1977); United States v. Dinitz, supra, 424 U.S. at 611, 96 S. Ct. at 1061; United States v. Jorn, supra, 400 U.S. at 476, 91 S. Ct. at 552. The rationale for this conclusion was explained by the Court in United States v. Scott, supra:

> Where . . . a defendant successfully seeks to avoid his trial prior to its conclusion by a motion for mistrial, the Double Jeopardy Clause is not offended by a second prosecution. "[A] motion by the defendant for a mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by a prosecutorial

or judicial error." United States v. Jorn, 400 U.S. 470, 485 [91 S. Ct. 547, 557, 27 L. Ed. 2d 543] (1971) (opinion of Harlan, J.). Such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact. "The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." United States v. Dinitz, 424 U.S. 600, 609 [96 S. Ct. 1075, 1080, 47 L. Ed. 2d 267] (1976). But "[t]he Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions." Id., at 611 [96 S. Ct. at 1081]. 437 U.S. at 93-94, 98 S. Ct at 2194-2195 (emphasis added).

In Scott this rationale was found applicable to the situation where the defendant successfully moves for a dismissal "not on the merits." The Court could find, at least in some cases, no functional distinction between a dismissal "not on the merits" and a mistrial.

Id. at 94, 98 S. Ct. at 2195, citing Lee v. United States, supra, 432 U.S. at 31, 97 S. Ct. at 2146. The defendant in Scott, both before trial and twice during trial, moved to dismiss two of three counts of the indictment on the grounds of prejudicial delay. The trial court granted defendant's motion after hearing all the evidence. The third count was submitted to the the jury, which returned a verdict of not guilty. 437 U.S. at 84, 98 S. Ct. at 2190. On appeal the Supreme Court permitted retrial on the first two counts since the defendant himself sought dismissal on grounds "unrelated to factual guilt or innocence." Id. at 87, 98 S. Ct. at 2191.

The Court reasoned that such a result does not conflict with the underlying purposes of double jeopardy:

> But that situation [acquittal] is obviously a far cry from the present case, where the government was quite willing to continue with its production of evidence to show the defendant guilty before the jury first empaneled to try him, but the defendant elected to seek termination of the trial on grounds unrelated to guilt or innocence. This is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact. Id. at 96, 98 S. Ct. at 2196.

The Court concluded that "the Double Jeopardy Clause, which guards against government oppression, does not relieve a defendant from the consequences of his voluntary choice." Id. at 99, 98 S. Ct. at 2198. It held that double jeopardy does not bar a government appeal where the defendant successfully seeks to have the trial terminated "without any submission to either judge or jury as to his guilt or innocence." Id. at 101, 98 S. Ct. at 2199.

Scott makes clear that the real function of the Double Jeopardy Clause is to safeguard acquittals, rather than to bar successive trials per se. Whitebread, Criminal Procedure, §24.03 (1980). Significant to its holding, however, is an understanding of what amounts to an acquittal. The Scott Court adopted the following definition:

> [An acquittal occurs] only upon a jury verdict of not guilty [or when] the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.

United States v. Scott, supra, 437 U.S. at 97, 98 S. Ct. at 2197, citing United States v. Martin Linen Supply Company, supra, 430 U.S. at 571, 97 S. Ct. at 1354.

In essence, the Scott decision expanded considerably the government's right to appeal a defense initiated

dismissal. An appeal is barred only if the dismissal is the functional equivalent of an acquittal. See generally, Whitebread, supra at §24.03.

Thus, where the Commonwealth initiates an appeal seeking a retrial following defendant's successful motion for dismissal, or has made the motion for a mistrial, the situation must be carefully construed to determine whether the subsequent trial would offend the prohibition against double jeopardy. Clearly, a retrial of the defendant after the first trial ended in a judgment of acquittal would be violative of the very essence of the double jeopardy guarantee. United States v. Scott, supra; United States v. Martin Linen Supply Company, supra; Fong Foo v. United States, 369 U.S. 141, 82 S. Ct. 671, 7 L. Ed. 2d 629 (1962). So too, where a mistrial

is granted at the initiative of the prosecution or the court without a finding of "manifest necessity,"[4] a subsequent trial would be prohibited. See, e.g., United States v. Jorn, supra, Downum v. United States, 372 U.S. 734, 736, 83 S. Ct. 1033, 1034, 10 L. Ed. 2d 100 (1963). It does not follow, however, that every termination of the trial favorable to the defendant is insulated from a government appeal. The above analysis of the United States Supreme Court decisions has made clear that every

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[4]The doctrine of "manifest necessity" was first articulated in United States v. Perez, 22 U.S. 579, 580, 9 Wheat. 579, 6 L. Ed. 165 (1824):

> [T]he law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere.

termination favorable to the defendant does not implicate double jeopardy concerns.

Having set forth the guidelines enunciated in Scott, we must now ascertain whether the demurrer, as utilized in criminal cases in this Commonwealth, amounts to the functional equivalent of an acquittal, or rather is equivalent to a dismissal "not on the merits." An acquittal, by definition, represents a resolution in the defendant's favor, correct or not, of some or all of the factual elements of the offense charged. United States v. Scott, supra, 437 U.S. at 97, 98 S. Ct. at 2197, quoting United States v. Martin Linen Supply Company, supra, 430 U.S. at 571, 97 S. Ct. at 1354 (1977). By contrast, common law has always characterized a demurrer as an "issue as to law," as distinguished

from an "issue of fact."

> An issue upon matter of law is called a demurrer: and it confesses the facts to be true, as stated by the opposite party; . . . . As, if the matter of the plaintiff's complaint or declaration be insufficient in law, ... then the defendant demurs to the declaration; . . .

3 W. Blackstone, Commentaries 314 (13th Ed. 1800). This common-law description is identical in all material respects to the nature of the demurrer currently part of Pennsylvania criminal procedure.[5]

An early decision of the Superior Court, Commonwealth v. Williams, 71 Pa. Super. 311 (1919), described the essential nature of the demurrer in Pennsylvania Criminal law:

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[5]Pa. R. Crim. P. 1124(a)(1) provides:

> (a) A defendant may challenge the sufficiency of the evidence to sustain a conviction of one or more of the offenses charged by a:
>
> > (1) demurrer to the evidence presented by the Commonwealth at the close of the Commonwealth's case-in-chief.

> In criminal cases demurrer to the evidence of the Commonwealth admits all the facts which the evidence tends to prove, and all inferences reasonably deducible therefrom. Commonwealth v. Parr, 5 W. & S. 345; Golden v. Knowles, 120 Mass. 136, Wharton's Crim. Ev. Sec. 616; McKowen v. McDonald, 43 Pa. 441. The court in such case is not the trier of the facts. The admissions implied in the demurrer leave for consideration the single inquiry whether the evidence introduced presents such a state of facts, with the inferences fairly arising therefrom, as would support a verdict of guilty.
> Id. at 313 (emphasis added).

In deciding whether to grant a demurrer, the court does not determine whether or not the defendant is guilty on such evidence, but determines whether the evidence, if credited by the jury, is legally sufficient to warrant the conclusion that the defendant is guilty beyond a reasonable doubt. Commonwealth v. DePetro, 350 Pa. 567, 39 A. 2d 838 (1944). Thus the test to be applied in ruling on a demurrer is whether the

Commonwealth's evidence and all reasonable inferences therefrom are sufficient to support a finding by the trier of fact that the accused is guilty beyond a reasonable doubt. Commonwealth v. Wimberly, 488 Pa. 169, 411 A. 2d 1193 (1979); Commonwealth v. Mitchell, 460 Pa. 665, 334 A. 2d 285 (1975); Commonwealth v. Carroll, 443 Pa. 518, 278 A. 2d 898 (1971).

Hence, by definition, a demurrer is not a factual determination. As stated in Commonwealth v. Kerr, 150 Pa. Super. 598, 29 A. 2d 340 (1943), "[t]he object of a demurrer to the evidence is to ascertain the law on an admitted state of facts." The trial judge may not pass upon the credibility of Commonwealth witnesses at the demurrer stage of the proceedings. Commonwealth v. Wimberly,

supra, 488 Pa. at 172, 411 A. 2d at 1194, citing Commonwealth v. Parrish, 250 Pa. Super. 176, 378 A. 2d 884 (1977). The trial judge also is precluded from weighing the Commonwealth's evidence. Commonwealth v. Kelly, 237 Pa. Super. 468, 352 A. 2d 127 (1975). Thus, the question before the trial judge in ruling on a demurrer remains purely one of law. Commonwealth v. Wimberly, supra; Commonwealth v. Haines, 410 Pa. 601, 190 A. 2d 118 (1963).

We conclude, therefore, that a demurrer is not the functional equivalent of an acquittal, and that the Commonwealth has the right to appeal from an order sustaining defendant's demurrer to its case-in-chief. In such a situation, the defendant himself elects to seek dismissal on grounds unrelated to his

factual guilt or innocence.[6]

Our decision today does not establish a new principle of law - it is consistent with the law of this Commonwealth utilized prior to the Superior Court's ruling in Commonwealth v. Smalis, supra. In Commonwealth v. Wimberly, supra, we stated, "[i]t is well settled that an order

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[6]In both cases presently under consideration the defendant elected to seek a demurrer pursuant to Pa. R. Crim P. 1124(a)(1), rather than the other options set forth in that rule. The Rule also provides:

> (a) A defendant may challenge the sufficiency of the evidence to sustain a conviction of one or more of the offenses charged by a:
>
> (2) motion for judgment of acquittal at the close of all the evidence;
>
> (3) motion for judgment of acquittal filed within ten (10) days after the jury has been discharged without agreeing upon a verdict; or
>
> (4) motion in arrest of judgment filed within ten (10) days after a finding of guilt.

granting a demurrer, properly entered,[7] is purely a question of law and is appealable by the Commonwealth." Id., 488 Pa. at 172, 411 A. 2d at 1194, citing Commonwealth v. Long, 467 Pa. 98, 354 A. 2d 569 (1976) and Commonwealth v. Simpson, 310 Pa. 380, 165 A. 498 (1933). We also stated in Wimberly, supra, that "[i]n those cases where this Court has concluded that a demurrer was granted in error, we have remanded for new trial." Id.

Accordingly, we reverse the Superior Court and remand Commonwealth v. Zoller, supra, where it was determined that the demurrer was granted in error, for a new trial. With regards to Commonwealth

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[7]We do not address those situations where demurrers are improperly granted, or act as the functional equivalent of an acquittal. That issue was adequately decided in Commonwealth v. Wimberly, 488 Pa. 169, 411 A. 2d 1193 (1979).

v. Smalis, supra, we remand to the Superior Court to pass upon the merits of the demurrer ruling entered by the trial court.[8]

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[8]In Commonwealth v. Smalis, 331 Pa. Super. 307, 480 A. 2d 1046 (1984), the Superior Court did not reach the merits of the Commonwealth's appeal. By contrast, in Commonwealth v. Zoller, 318 Pa. Super. 402, 465 A. 2d 16 (1983), the Superior Court first found that the demurrer was improperly granted before dismissing the appeal.

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

DESPINA SMALIS, a/k/a PEPE SMALIS,
Appellee

Nos. 12, 14, 45 & 47 Pittsburgh 1981

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

ERNEST SMALIS, a/k/a ANASTASIOS SMALIS,
Appellee

Nos. 13, 15, 46 & 48 Pittsburgh 1981

BEFORE: SPAETH, P. J., WICKERSHAM,
BROSKY, ROWLEY, WIEAND,
JOHNSON and HOFFMAN, JJ.

OPINION BY WIEAND, J.

June 29, 1984

The trial court in this criminal action sustained defense demurrers to charges of murder, voluntary manslaughter, and causing a catastrophe. The Commonwealth appealed. We do not reach the substantive merits of the appeal.

Principles of double jeopardy, as interpreted and applied by recent decisions of the Supreme Court of the United States, bar the Commonwealth's right of appeal and compel us to quash the appeal.

Despina Smalis and Ernest Smalis were the owners of a building in the Oakland section of Pittsburgh which housed a bar and restaurant known as "Chances R" and seven dwelling units. On February 12, 1979, a fire destroyed the building, killing two tenants who were in the dwelling units. The owners were accused of setting the fires or causing them to be set and were charged with criminal homicide, recklessly endangering another person, causing a catastrophe and failing to prevent a catastrophe. Despina Smalis was also charged with theft by deception. The evidence was heard by the court

without a jury. At the close of the Commonwealth's case, the trial court sustained a demurrer to the evidence with respect to the charges of murder, voluntary manslaughter and causing a catastrophe.[1] The court did so because, as the trial court observed in a subsequent opinion, "[a]s the trier of fact and law, the court was not satisfied,

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[1]Trial on the remaining charges of involuntary manslaughter, recklessly endangering, failing to prevent a catastrophe, and theft by deception, was continued and held in abeyance to permit the Commonwealth to appeal the order sustaining demurrers to the charges of murder, voluntary manslaughter and causing a catastrophe. This procedure is not recommended. After a criminal trial has been commenced, it should not be delayed by piecemeal appeals from orders which do not terminate the proceedings finally. Because we conclude that the Commonwealth in any event has no right of appeal from a mid-trial determination that the evidence is insufficient to sustain a conviction, we do not decide whether the court's order in this case was interlocutory or sufficiently final to permit appeal.

"after considering all of the facts together with all reasonable inferences which the Commonwealth's evidence tended to prove, that there was sufficient evidence from which it could be concluded that either of the defendants was guilty beyond a reasonable doubt of setting or causing to be set the fire in question." The Commonwealth appealed.[2]

Until recent times, a demurrer to the evidence was merely a procedural device, authorized by the Act of June 5, 1937, P.L. 1703, §1, 19 P.S. §481 (repealed), by which a criminal defendant might test the sufficiency of the evidence at the close of the Commonwealth's case. See: Commonwealth v. Heller et al.,

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[2]The trial court granted a Commonwealth petition for reconsideration, but after reconsidering, the court confirmed its prior order sustaining the demurrers. The Commonwealth filed a second appeal from this order.

147 Pa. Super. 68, 83, 24 A. 2d 460, 467 (1942). See also: 10A P.L.E. Criminal Law §617. Under this practice, it was said, an order sustaining a demurrer to the evidence determined no facts and was purely a question of law. Such an order, the decisions uniformly held, was appealable by the Commonwealth. Commonwealth v. Long, 467 Pa. 98, 100 n. 2, 354 A. 2d 569, 570 n. 2 (1976); Commonwealth v. Melton, 402 Pa. 628, 629, 168 A. 2d 328, 329 (1961); Commonwealth v. Lewis, 299 Pa. Super. 367, 368, 445 A. 2d 798, 799 (1982); Commonwealth v. Matsinger, 288 Pa. Super. 271, 273, 431 A. 2d 1043, 1044 (1981); Commonwealth v. Barone, 276 Pa. Super. 282, 289 n. 9, 419 A. 2d 457, 461 n. 9 (1980); Commonwealth v. Ferrone, 218 Pa. Super. 330, 333, 280 A. 2d 415, 417 (1971).

The practice of demurring to the evidence is now governed by Pa. R. Crim. P. 1124(a). This rule equates a demurrer to the evidence with other motions intended to challenge the legal sufficiency of the evidence to support a conviction. The rule provides:

> (a) A defendant may challenge the sufficiency of the evidence to sustain a conviction of one or more of the offenses charged by a:
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> (1) demurrer to the evidence presented by the Commonwealth at the close of the Commonwealth's case-in-chief;
>
> (2) motion for judgment of acquittal at the close of all the evidence;
>
> (3) motion for judgment of acquittal filed within ten (10) days after the jury has been discharged without agreeing upon a verdict; or
>
> (4) motion in arrest of judgment filed within ten (10) days after a finding of guilt.

When a court finds the Commonwealth's evidence legally insufficient under this

Rule, the evidence has been found to be so lacking in sufficiency that no rational fact finder could base a conviction thereon. When such a determination has been made, the Supreme Court of the United States has held, principles of double jeopardy bar a second trial.

When a trial judge directs a verdict of acquittal, as under Rule 1124(a)(2), that verdict is final. Because a second trial is barred by principles of double jeopardy, the Commonwealth has no right of appeal from an order directing a verdict of acquittal. Fong Foo v. United States, 369 U.S. 141, 82 S. Ct. 671, 7 L. Ed. 2d 629 (1962). See also: Finch v. United States, 433 U.S. 676, 97 S. Ct. 2909, 53 L. Ed. 2d 1048 (1977) (dismissal of charges prior to entry of verdict on grounds that stipulated

facts did not state an offense held unappealable); In the Interest of R.K.K., 112 Ill. App. 3d 982, 446 N.E. 2d 307 (1983) ("directed verdict" entered at close of state's case-in-chief based upon state's failure to prove age of victim in statutory rape case held not appealable); State v. Murrell, 54 N.C. App. 342, 283 S.E. 2d 173 (1981) (dismissal of charges on insufficiency grounds at close of trial held not appealable). Cf. People v. Casiel, 41 N.Y. 2d 945, 394 N.Y.S. 2d 630, 363 N.E. 2d 354 (1977), reversing 42 A.D. 2d 762, 346 N.Y.S. 2d 349 (1973); State v. Winborne, 273 S.C. 62, 254 S.E. 2d 297 (1979).

When a trial court grants a motion for judgment of acquittal after the jury has been discharged without agreeing upon a verdict, as under Rule 1124(a)(3),

the defendant cannot be retried. Such a ruling represents a final determination that the prosecution failed to prove facts sufficient to convict. It is the same determination which is made by a court when it directs a verdict of acquittal at the close of the evidence. Because the federal Double Jeopardy Clause bars a retrial, the Commonwealth has no right of appeal from an order directing a verdict under such circumstances. United States v. Martin Linen Supply Company, 430 U.S. 564, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977). See also: United States v. Suarez, 505 F. 2d 166 (2d Cir. 1974).

Principles of double jeopardy are applicable also when a trial court has granted a post-trial motion in arrest of judgment in a manner similar to that provided for in Rule 1124(a)(4) or where

an appellate court has reversed a conviction on grounds that the evidence was so inadequate that no rational fact finder could have voted to convict thereon. Hudson v. Louisiana, 450 U.S. 40, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981) (determination by trial court pursuant to post-trial motion that evidence was insufficient to support conviction bars retrial); Greene v. Massey, 437 U.S. 19, 98 S. Ct. 2151, 57 L. Ed. 2d 15 (1978) (determination by appellate court that evidence was insufficient to support conviction bars retrial); Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) (determination by appellate court that government failed to introduce sufficient evidence to rebut defendant's proof of insanity, holding in essence that trial court should have directed a verdict in defendant's favor,

bars retrial). However, where a trial court has found post-verdict that the evidence was insufficient as a matter of law to support the verdict, that determination is subject to appellate review, for an order by an appellate court reversing such a conclusion and reinstating the verdict does not require a second trial. Therefore, there is no violation of principles of double jeopardy. Commonwealth v. Rawles, 501 Pa. 514, ___, 462 A. 2d 619, 621 (1983). See also: United States v. Singleton, 702 F. 2d 1159 (D.C. Cir. 1983) (collecting cases at 1161-1162 n. 8); Commonwealth v. Macolino, 503 Pa. 201, 469 A. 2d 132 (1983) (Superior Court's reversal of judgment of sentence on grounds of insufficiency of evidence reversed by Supreme Court).

The legal principle to be drawn

from these decisions was articulated in United States v. Scott, 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978) as follows: "A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal." Id. at 91, 98 S. Ct. at 2194, 57 L. Ed. 2d at 74 (footnote omitted).[3]

A demurrer to the evidence requires a court to accept as true the evidence presented by the Commonwealth and view

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[3]This rule has no application to cases where a trial judge has terminated a criminal proceeding favorably to the defendant on a basis not related to factual guilt or innocence (United States v. Scott, supra) or where a retrial has been granted at the instance of the defendant because a court found a verdict of guilty contrary to the weight of the evidence (Tibbs v. Florida, 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982)).

that evidence, together with all reasonable inferences to be drawn therefrom, in the light most favorable to the Commonwealth. See: Commonwealth v. Turner, 491 Pa. 620, 622, 421 A. 2d 1057, 1058 (1980); Commonwealth v. Wimberly, 488 Pa. 169, 171, 411 A. 2d 1193, 1194 (1979); Commonwealth v. Duncan, 473 Pa. 62, 66 n. 2, 373 A. 2d 1051, 1052 n. 2 (1977); Commonwealth v. Long, supra at 100, 354 A. 2d at 570; Commonwealth v. Bastone, 321 Pa. Super. 232, ___, 467 A. 2d 1339, 1341 (1983), Commonwealth v. Cugnini, 307 Pa. Super. 113, 115, 452 A. 2d 1064, 1065 (1982); Commonwealth v. Gilliard, 300 Pa. Super. 469, 478, 446 A. 2d 951, 955 (1982). The court must then determine whether the Commonwealth's evidence, when so considered, is sufficient to permit a rational person to base thereon a finding

of guilt beyond a reasonable doubt.

The Supreme Court of the United States has not distinguished and set aside for separate treatment those determinations of evidentiary insufficiency which are made mid-trial. See and compare: Sanabria v. United States, 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978) (pre-verdict acquittal for insufficient evidence, even though caused by erroneous evidentiary ruling, held not appealable); Finch v. United States, supra (dismissal of charges prior to entry of verdict on grounds that stipulated facts did not state an offense held unappealable); Fong Foo v. United States, supra (order directing verdict of acquittal entered during government's case-in-chief held not appealable). The Supreme Court has said, rather, that in determining whether

action taken by the trial court has constituted an "acquittal" for double jeopardy purposes, the form of the judge's action is not controlling. "[W]e must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." United States v. Martin Linen Supply Company, supra at 571, 97 S. Ct. at 2147, 51 L. Ed. 2d at 651 (emphasis added). See: United States v. Scott, supra at 97, 98 S. Ct. at 2197, 57 L. Ed. 2d at 78; Burks v. United States, supra at 10, 98 S. Ct. at 2147, 57 L. Ed. 2d at 9; United States v. Genser, 710 F. 2d 1426, 1427-1428 (10th Cir. 1983); United States v. Allison, 555 F. 2d 1385, 1387 (7th Cir. 1977); Commonwealth v. Ward, 493 Pa. 115, 425 A. 2d 401 (plurality opinion), cert.

denied, 451 U.S. 974, 101 S. Ct. 2055, 68 L. Ed. 2d 354 (1981); Commonwealth v. Tabb, 491 Pa. 372, 421 A. 2d 183 (1980), cert. denied, 451 U.S. 1000, 101 S. Ct. 1708, 68 L. Ed. 2d 202 (1981); Commonwealth v. Wimberly, supra; Commonwealth v. Dincel, 311 Pa. Super. 470, 457 A. 2d 1278 (1983).

In view of recent Supreme Court decisions, a growing number of jurisdictions has held that a judicial determination of insufficient evidence, when made mid-trial, is not subject to appeal. See: Miller v. State, 648 P. 2d 1015 (Alaska 1982) (charges dismissed after state's case-in-chief on insufficiency grounds due to inability of witness to testify held not subject to reinstatement); State v. Smith, 164 Ga. App. 598, 298 N.E. 2d 583 (1982) (no right of appeal from "directed

verdict" entered at close of case-in-chief); In The Interest of R.K.K., supra (same); State v. Whorton, 225 Kan. 251, 589 P. 2d 610 (1979) (dismissal of charges during state's case-in-chief on insufficiency grounds held unappealable); State v. Shaw, 282 Md. 231, 383 A. 2d 1104 (1978) (dismissal of charges upon submitted facts not appealable where trial court held that alleged criminal conduct did not constitute crime); People v. Anderson, 409 Mich. 474, 295 N.W. 2d 482 (1980), cert. denied, 449 U.S. 1101, 101 S. Ct. 896, 66 L. Ed. 2d 827 (1981) (determination that evidence was insufficient to sustain charge of first degree murder after presentation of some, but not all, of state's case-in-chief held unappealable); State v. Greenwalt, ___ Mont. ___, 663 P. 2d 1178 (1983) (no appeal from dismissal of charges

on insufficiency grounds after state's case-in-chief); People v. Brown, 40 N.Y. 2d 381, 386 N.Y.S. 2d 848, 353 N.E. 2d 811 (1976), cert. denied, 433 U.S. 913, 97 S. Ct. 2986, 53 L. Ed. 2d 1099 (1977), followed as stated in People v. Keys, 45 N.Y. 2d 111, 408 N.Y.S. 2d 16, 379 N.E. 2d 1147 (1978) (same); State v. Musselman, 667 P. 2d 1061 (Utah 1983 (same); In the Matter of Dowling, 98 Wash. 2d 542, 656 P. 2d 497 (1983) (same).

An order sustaining a demurrer to the evidence under current Pennsylvania practice is a mid-trial determination that the prosecution's evidence is legally insufficient to support a conviction. Pa. R. Crim. P. 1124(a)(1). For double jeopardy purposes it has precisely the same effect as a directed verdict of acquittal. A court has made a determination that upon the evidence

presented no rational fact finder could vote to convict the defendant. This is a termination of the trial on a basis related to a factual determination of guilt or innocence. "Under the dispositive [decisions of the Supreme Court] such a ruling of insufficiency, no matter how labeled, represents a conclusion that there has been a failure of proof: that is, there has been an acquittal which is to be accorded the special significance of finality and unreviewability." Strazzella, Commonwealth Appeals and Double Jeopardy, 4 Pa. L. J. 11, 12 (1981).

In a case in which a trial court based an order granting a demurrer upon a comparison of the relative credibility of witnesses, this Court held that the Commonwealth had no right of appeal. Commonwealth v. Stumpo, 306 Pa. Super.

447, 452 A. 2d 809 (1982). Accord: Commonwealth v. Wimberly, supra. We have also held that the Commonwealth has no right of appeal where the trial court has sustained a demurrer to the evidence and, in addition, has entered a finding of not guilty. Commonwealth v. Thinnes, 263 Pa. Super. 79, 397 A. 2d 5 (1979). Accord: Commonwealth v. Haines, 410 Pa. 601, 190 A. 2d 118 (1963). For double jeopardy purposes, there is no practical distinction to be drawn between the determinations made in these cases and a determination that the evidence, when considered in the light most favorable to the Commonwealth, is so lacking in sufficiency that no rational fact finder can rest a conviction thereon. In either situation, there has been a termination of the trial on a basis related to a factual determination of

guilt or innocence. In either situation, a second trial is necessary in the event of reversal.

How, then, can an order sustaining a demurrer to the evidence under Pennsylvania practice be distinguished from other insufficiency determinations which are not appealable? If it cannot be so distinguished, how can we refuse to follow the decisions of the Supreme Court of the United States which define and apply the Double Jeopardy Clause of the United States Constitution? The answer is that we cannot. Prior Pennsylvania decisions holding that orders sustaining demurrers are appealable by the Commonwealth can no longer be followed. They are at variance with decisions of the Supreme Court of the United States. We hold, therefore, that a mid-trial order holding the evidence

insufficient to support a conviction is not appealable by the Commonwealth.[4]

Where the trial court's determination constitutes an "acquittal" within the definition of Martin Linen, an appeal is barred not only when it might result in a second trial, but also if reversal would translate into "'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged. . . '" United States v. Martin Linen Supply Company, supra at 570, 97 S. Ct. at 1354, 51 L. Ed. 2d at 650, quoting with approval from United States v. Jenkins, 420 U.S. 358, 370, 95 S. Ct. 1006, 1013, 43 L.

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[4]Our holding will increase the responsibility vested in trial courts. It should encourage trial judges to exercise even greater care and caution in sustaining defense demurrers to the evidence.

Ed. 2d 250, 259 (1975).[5] See also: United States v. Harvey, 377 F. 2d 411, 414 (D.C. App. 197); State v. Shaw, supra 282 Md. at 232, 383 A. 2d at 1106; People v. Brown, supra, 40 N.Y. 2d at 389-390, 386 N.Y.S. 2d at 854, 353 N.E. 2d at 818; Commonwealth v. Bolden, 472 Pa. 602, 630, 373 A. 2d 90, 103 (1977) (plurality opinion); State v. Musselman, supra at 1066 & n. 5. In the instant case, even if it were feasible to resume the pending trial in the event of appellate reversal of the trial court's determination, further proceedings devoted

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[5]The decision in United States v. Jenkins was overruled on other grounds in United States v. Scott, supra, holding that the government has a right of appeal from pre-verdict orders entered pursuant to defense motions for dismissal of charges unrelated to "factual guilt or innocence." See: Lee v. United States, 432 U.S. 23, 29-30 & n. 7, 97 S. Ct. 2141, 2145 & n. 7, 53 L. Ed. 2d 80, 86-87 & n. 7 (1977).

to the resolution of substantive factual issues would most certainly be necessary.

The trial court in the instant case granted a defense demurrer to charges of murder and voluntary manslaughter and also to counts of causing a catastrophe. Its decision was based upon a determination that the evidence adduced by the Commonwealth was legally insufficient to enable a rational person to find the defendants guilty of those charges. This was a decision factually related to guilt or innocence. If it were reversed, further proceedings devoted to the resolution of factual issues would be necessary. Such proceedings, however, are barred by principles of double jeopardy. Under these circumstances, the Commonwealth has no right of appeal.

Appeal quashed.

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

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Appellee

Nos. 12, 14, 45 & 47 Pittsburgh 1981

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Appellant

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Appellee

Nos. 13, 15, 46 & 48 Pittsburgh 1981

DISSENTING OPINION BY JOHNSON, J.

June 29, 1984

Shall the Commonwealth hereafter be foreclosed from securing appellate review where the defendant successfully seeks to avoid a full trial by challenging the sufficiency of the evidence by demurrer at the close of the Commonwealth's case-in-chief? Does appellate review of such a midtrial determination invade any interest

protected by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, thereby barring a Commonwealth appeal therefrom? Since I find the answer to both of these questions to be in the negative, I must respectfully dissent.

The majority opinion is clearly correct in observing that a judgment of acquittal may not be appealed and terminates the prosecution when a second trial would be necessitated by reversal. This assertion is entirely consistent with the principal objectives of the Double Jeopardy Clause, and I endorse it completely. In the instant appeal, however, we have neither a judgment of acquittal nor the clear necessity of a retrial assuming reversal.

The constitutional prohibition of double jeopardy has been held to consist

of three separate guarantees: (1) protection against a second prosecution for the same offense after acquittal, (2) protection against a second prosecution after conviction, and (3) protection against multiple punishments for the same offense. Commonwealth v. Maddox, 307 Pa. 524, 453 A. 2d 1010 (1983). Two threshold conditions must be met in order to implicate the prohibition against multiple punishments: (1) the accused must have been placed in jeopardy and (2) there must be a threat of successive prosecutions. United States v. Martin Linen Supply Company, 430 U.S. 564, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977). The constitutional protection afforded by the Double Jeopardy Clause against government appeals in criminal cases attaches only where there is a danger of subjecting the defendant to

a second trial for the same offense. United States v. Wilson, 420 U.S. 332, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975).

Both the majority and this writer turn to United States v. Scott, 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978) to ascertain the legal principles to be drawn from the federal cases reviewing the tension between the right of an appeal by the prosecutor and the prohibitions of the Double Jeopardy Clause. We reach different conclusions.

It is worth noting that the majority in Scott determined that "'the lessons of experience' indicate that Government appeals from midtrial dismissals requested by the defendant would significantly advance the public interest in assuring that each defendant shall be subject to a just judgment on the merits of his case. . . . " Scott, 437 U.S. at 101,

98 S. Ct. at 2199, 57 L. Ed. 2d at 80-81. There, the trial court did not grant the motion for dismissal until after the close of all the evidence, disposing of two counts of a three-count indictment. On appeal, the Sixth Circuit, relying on United States v. Jenkins, 420 U.S. 358, 95 S. Ct. 1006, 43 L. Ed. 2d 250 (1975) dismissed the government's appeal in the belief that any further prosecution was barred by the Double Jeopardy Clause. The Supreme Court, in overruling Jenkins, held that a defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence, suffers no injury cognizable under the Double Jeopardy Clause if the government is permitted to appeal from such a trial court ruling. Scott, 437 U.S. at 98-99, 98 S. Ct. at 2198, 57 L. Ed. 2d at 79.

This writer recognizes that Scott involved a motion to dismiss based upon preindictment delay which some might argue presents a clearer case of a basis unrelated to factual guilt or inncoence than does the demurrer here involved. I submit, nevertheless, that the action of the trial judge on the instant appeal, in granting the demurrer, did not attempt to reach the factual issue of guilt or innocence --- and the rule laid down in Scott is applicable here. I respectfully suggest that the majority misperceives the principle of law involved when it asserts, without citation to any authority, that the decision of the trial court in granting the demurrer was "factually related to guilt or innocence." (Slip op. at 17, cf. id. at 14).

I need not take issue with the

majority's extended explication of the rules to be applied when the Commonwealth might seek to appeal from orders granting motions for acquittal, under Pa. R. Crim. P. 1124(a)(2) and (a)(3), since that factual situation is not before us. Nor need I pause to consider the applicability of double jeopardy principles to attempted appeals from orders granting a post-trial motion in arrest of judgment. The plain fact is that neither the United States Supreme Court nor our own supreme court has ever held that the government is barred from taking an appeal from an order granting a demurrer where retrial has not been shown to be necessary.

To the extent that the majority's holding in this case might be understood as implying that our own supreme court has not been reading the decisions of

the Supreme Court, I must distance myself from that view. In Commonwealth v. Wimberly, 488 Pa. 169, 411 A. 2d 1193 (1979), our supreme court reviewed, by direct appeal, the grant of a demurrer to all charges which had been entered at the conclusion of the Commonwealth's case. Viewing the trial court action upon the demurrer as being "a de facto judgment of acquittal", the court dismissed the appeal at 488 Pa. 173, 411 A. 2d at 1195, on the rationale that it was "utterly beyond dispute that a judgment of acquittal is not appealable by the Commonwealth." 488 Pa. at 173, 411 A. 2d at 1194.

Nevertheless, the Wimberly court recognized, by way of dictum, that "[i]t is well settled that an order granting a demurrer, properly entered, is purely a question of law and is appealable by

the Commonwealth." Id. (emphasis in original. Justice O'Brien, speaking for our supreme court, cited to United States v. Scott, supra, quoting United States v. Martin Linen Supply Company, supra, for the proposition that an acquittal occurs only when the ruling of the judge actually represents a resolution in the defendant's favor, correct or not, of some or all of the factual elements of the offense charged.

While the majority acknowledges that this is the legal principle to guide us in resolving this appeal and, in fact, cites to Scott, Martin Linen Supply and Wimberly for this proposition, its analysis, in my view, obliterates the distinction which has long obtained between acquittals and demurrers "properly entered." After correctly observing that an order sustaining a demurrer "is

a mid-trial determination that the prosecution's evidence is legally insufficient to support a conviction" [47a] (emphasis added), the majority makes a quantum leap, without citation to any authority, and concludes that "[f]or double jeopardy purposes it has precisely the same effect as a directed verdict of acquittal." Id.

The majority goes on to compare the instant appeal with cases where the trial court actually compared the relative credibility of witnesses and cases where the trial court had entered a finding of not guilty in addition to sustaining a demurrer to the evidence. The majority then states:

> For double jeopardy purposes, there is no practical distinction to be drawn between the determinations made in these cases and a determination that the evidence, when considered in the light most favorable to the Commonwealth, is

> so lacking in sufficiency that no rational fact finder can rest a conviction thereon. In either situation, there has been a termination of the trial on a basis related to a factual determination of guilt or innocence. In either situation, a second trial is necessary in the event of reversal. [49a-50a.]

I cannot agree. I do not understand why the majority finds no distinction between the alleged <u>legal</u> <u>insufficiency</u> which is before us on this appeal and the factual determinations in the cases upon which the comparison is made. Having read the trial court's opinion in this case, dated January 28, 1982, and having reviewed the trial transcript, I have found nothing which would lead me to conclude that the trial judge did anything more than consider the legal sufficiency of the Commonwealth's evidence. The majority does not assist me in my search for some justification for its conclusion inasmuch as the action of the trial judge

in the instant appeal is, inexplicably, not discussed in the majority opinion.

Equally disturbing is the bare assertion by the majority that a reversal of the trial court would necessitate "a second trial" and/or "further proceedings." Clearly, there is nothing in the record to support a conclusion by this court that a second trial would be necessary, were we to reverse. If this court is suggesting that mere passage of time necessarily dictates that the trial be begun all over again, assuming reversal and following remand, I feel that such an assertion should properly be accompanied by whatever reasoning there may be to support such an assertion. Apart from the fact that the record does not contain any evidence that a second trial would be mandatory, a midtrial appeal does not even raise that issue.

I am loath to assume that our trial courts are unable to resolve such an issue, if and when it might properly be presented to them.

In footnote 1 [32a], the majority disapproves of the trial court's stay of the remaining charges, pending resolution of this appeal. However, absent authority against the utilization of such a procedure under the instant circumstances, I fail to understand how the majority can hold that retrial should be required on the charges where the demurrers were sustained, in light of the fact that the charges were not dismissed and where the remaining charges were stayed. It would seem that the majority is making a determination on a factual situation that is not before us, namely, where charges have been dismissed pursuant to a demurrer and

trial terminated. As that factual situation is not before us, this court cannot then attempt to mold the facts by "disapproving" of a procedure in order to justify a ruling on a set of facts to which its ruling would apply.

The procedural posture of the instant case reveals that no danger of a second trial is present if the Commonwealth is permitted to appeal the instant orders. The trial court merely sustained appellees' demurrers to the charges. No dismissal of these charges nor discharge of appellees as to these counts occurred. In fact, the remaining charges concerning the Chances R fire were stayed, pending the resolution of this appeal.

It is not the purpose of this court to speculate on what will or might occur upon the return of this case to the trial court, absent clear authority. We cannot

and should not speculate as to what the trial judge or the parties may do in such a situation. The extent of the majority's holding, then, is improper, in my view, as reaching issues not cognizable on this appeal.

As a matter of policy, we should restrict our rulings to the factual and procedural posture of the case as presented to the court. The instant appeal does not entail the threat of retrial because the charges appealed from were not dismissed and the remaining charges stayed. Hence, in my view, the majority's attempt to apply double jeopardy principles to the instant facts is misplaced, as is any attempt to bootstrap such an application by implying that either the procedure in the instant case was inappropriate, or that future proceedings in this case implicate double

jeopardy.

I take no position as to whether the instant appeals would be barred by double jeopardy if retrial were required. However, as retrial is not involved instantly, I cannot concede that the appeals must be quashed in light of the voluminous authority permitting Commonwealth appeals from midtrial orders sustaining demurrers, when the trial court's ruling properly applied the test long established for such a ruling. See e.g. Commonwealth v. Wimberly, supra; Commonwealth v. Lewis, 299 Pa. Super. 367, 445 A. 2d 798 (1982); Commonwealth v. Wydo, 205 Pa. Super. 62, 208 A. 2d 12 (1965).

My conclusion that the appeals are not barred by double jeopardy requires me to reach the merits of the appeal.

Upon review of the record and

arguments from all parties, I find ample support for the trial court's conclusion that the evidence presented by the Commonwealth was legally insufficient to support a conviction on the charges of homicide, causing a catastrophe and voluntary manslaughter. I would therefore affirm the order of the trial court sustaining the demurrers to these charges, and remand with a procedendo.

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

DESPINA SMALIS, a/k/a PEPE SMALIS,
Appellee

Nos. 12, 14, 45 & 47 Pittsburgh 1981

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

ERNEST SMALIS, a/k/a ANASTASIOS SMALIS,
Appellee

Nos. 13, 15, 46 & 48 Pittsburgh 1981

ORDER

AND NOW, this 29th day of June, 1984, it is ordered as follows:

Appeals Quashed.

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

DESPINA SMALIS, a/k/a PEPE SMALIS,
Appellee

Nos. 12, 14, 45 & 47 Pittsburgh 1981

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

ERNEST SMALIS, a/k/a ANASTASIOS SMALIS,
Appellee

Nos. 13, 15, 46 & 48 Pittsburgh 1981

BEFORE: SPAETH, BROSKY
and MONTEMURO, JJ.

OPINION BY SPAETH, J.

July 8, 1983

This is an appeal by the Commonwealth from orders sustaining appellees' demurrers to charges of first, second and third degree murder, voluntary manslaughter, and causing a catastrophe. Appellees argue that the appeal is barred

by the Double Jeopardy Clause of the United States Constitution. We agree and therefore quash the appeal.

Pennsylvania criminal procedure has long permitted a defendant "at a close of the Commonwealth's case . . . [to] demur[] to the evidence submitted by the Commonwealth . . . . " 19 P.S. §481, repealed by 42 Pa.C.S.A. §20002(a) (1982) (preserved as part of the common law by 42 Pa.C.S.A. §20003(b) (1982). The procedure the trial court is to follow in ruling on a demurrer is equally settled. First the court must assume that the trier of fact would accept the Commonwealth's evidence as true, which includes giving the Commonwealth the benefit of every favorable inference from the evidence; and then the court must decide whether, on that assumption, the trier of fact could find the defendant

guilty beyond a reasonable doubt. Commonwealth v. Wimberly, 488 Pa. 169, 171, 411 A. 2d 1193, 1194 (1979).

As appellant, the Commonwealth has assembled a long line of Pennsylvania decisions in support of the proposition that the Commonwealth may appeal from an order sustaining a demurrer in a criminal case. E.g, Commonwealth v. Wimberly, supra; Commonwealth v. Melton, 402 Pa. 628, 168 A. 2d 328 (1961).[1] However, another line of decisions establishes the proposition that the Commonwealth may not appeal from an order of acquittal. See, e.g., Commonwealth v. Faircloth, 216 Pa. Super. 351, 268 A. 2d 207 (1970); Commonwealth v. Arnold, 215 Pa. Super. 444, 258 A. 2d 885 (1969).

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[1]The Supreme Court first held an order sustaining a demurrer appealable by the Commonwealth in Commonwealth v. Parr, 5 Watts & Sergeant 345 (1843).

The term "acquittal" embraces any disposition of the case in the defendant's favor that either is or purports to be predicated upon findings of fact. Compare Commonwealth v. Wimberly, supra (Where lower court improperly considered credibility in course of ruling on demurrer, order sustaining demurrer was de facto acquittal and Commonwealth could not appeal) with Commonwealth v. Thinnes, 263 Pa. Super. 79, 397 A. 2d 5 (1979) ("[W]here the trial court 'sustains the defendant's demurrer to the Commonwealth's evidence and in addition erroneously enters a judgment of not guilty, the Commonwealth may not appeal.' [quoting Commonwealth v. Haines, 410 Pa. 601, 603-04, 190 A. 2d 118, 119 (1963)]").

These two lines of decisions have been distinguished from each other, and thus reconciled, on the ground that an

order sustaining a demurrer poses "purely a question of law," whereas an order of acquittal is predicated upon findings of fact. Borough of West Chester v. Lal, 493 Pa. 387, 391, n. 4, 426 A. 2d 603, 604, n. 4 (1981); Commonwealth v. Wimberly, supra, at 172, 411 A. 2d at 1194; Commonwealth v. Long, 467 Pa. 98, 100, n. 2, 354 A. 2d 569, 570, n. 2 (1976). The question we must resolve is whether this distinction is consistent with the Double Jeopardy Clause of the fifth amendment to the United States Constitution, made applicable to the states through the fourteenth amendment. Benton v. Maryland, 394 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). See generally Strazzella, James A., Double Jeopardy: Legal Quicksand for Appeals, IV Pa. Law Journal-Reporter Nos. 39 & 40 (1981).

It is well-settled that the defendant in a criminal case may invoke the protection afforded by the Double Jeopardy Clause only if he fulfills "two threshold conditions." United States v. Martin Linen Supply Company, 430 U.S. 564, 569, 97 S. Ct. 1349, 1353, 51 L. Ed. 2d 642, 650 (1977). First, the defendant must show that he has been placed in jeopardy: "This state of jeopardy attaches when a jury is empaneled and sworn, or, in a bench trial, when the judge begins to receive evidence. Illinois v. Somerville, 410 U.S. 458, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973) (WHITE, J., dissenting); Downum v. United States, [372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963)]" Id. at 569, 97 S. Ct. at 1353-54, 51 L. Ed. 2d at 650. Next, the defendant must show that "a successful government appeal reversing

the judgments of acquittal would necessitate another trial, or, at least, 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged . . . . ' United States v. Jenkins, 420 U.S. 358, 370, 95 S. Ct. 1006, 1013, 43 L. Ed. 2d 250, 259 (1975) [overruled on other grounds in United States v. Scott, 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65, reh'g denied, 439 U.S. 883, 99 S. Ct. 226, 58 L. Ed. 2d 197 (1978)]." Id. at 570, 97 S. Ct. at 1354, 51 L. Ed. 2d at 650. Compare United States v. Scott, supra, at 91, 98 S. Ct. at 2194, 57 L. Ed. 2d at 74 ("A judgment of acquittal . . . may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal.") and Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141,

2147, 57 L. Ed. 2d 1, 9 (1978) ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster at the first proceeding.") with United States v. Jenkins, supra, at 365, 95 S. Ct. at 1011, 43 L. Ed. 2d at 256 ("[T]he Double Jeopardy Clause does not prohibit an appeal by the Government [from a judgment of acquittal] providing that a retrial would not be required in the event the Government is successful in its appeal. [citing United States v. Wilson, 420 U.S. 332, 344-45, 95 S. Ct. 1013, 1022, 43 L. Ed. 2d at 242 (1975)]") and United States v. Scott, supra, at 91, n. 7, 98 S. Ct. at 2194, n. 7, 57 L. Ed. 2d at 74, n. 7 (Court's assumption in "Jenkins . . . that a judgment of acquittal could be appealed where no

retrial would be needed on remand . . . . " not repudiated by subsequent decisions). When the defendant fulfills these threshold conditions, the Court must decide whether the order from which the prosecution seeks to appeal is an acquittal within the meaning of the Double Jeopardy Clause. In making this decision, the Court will not be controlled by the form of the order but will look to its substantive effect:

> [W]e have emphasized that what constitutes an "acquittal" is not to be controlled by the form of the judge's action. United States v. Sisson, supra, [399 U.S. 267 (1970)], at 270, 26 L. Ed. 2d 608, 90 S. Ct. 2117; cf. United States v. Wilson, 420 U.S. [322 (1975)], at 336, 43 L. Ed. 2d 232, 95 S. Ct. 1013. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.

United States v. Martin Linen Supply Company, supra, at 571, 97 S. Ct. at 1354-55, 51 L. Ed. 2d at 651.

See also United States v. Scott, supra, at 97, 98 S. Ct. at 2197, 57 L. Ed. 2d at 78; Burks v. United States, supra, at 10, 98 S. Ct. at 2147, 57 L. Ed. 2d at 9.

The defendant in Martin Linen had been "acquitted" under Fed. R. Crim. P. 29(c), which permitted a motion for an acquittal to be "made or renewed within seven days after the jury is discharged [without having returned a verdict]." Rule 29 also authorized the trial court to enter a judgment of acquittal "after the evidence on either side is closed . . . . ;" after the case has been submitted to the jury, but before the jury has returned a verdict; or "after [the jury] returns a verdict of guilty. . . ." Fed. R. Crim. P. 29(a) and (b). Rule 29(a) provided that in determining whether the defendant's motion should

be granted, "[t]he court . . . shall order the entry of judgment of acquittal . . . if the evidence is insufficient to sustain a conviction . . . . " The Government argued that the District Court's judgments should not be considered acquittals for double jeopardy purposes because they had been entered after the jury had been discharged. The Court, however, declined to "turn[] the constitutional significance of a Rule 29 judgment of acquittal on a matter of timing," and concluded that "Rule 29 contemplated no such artificial distinctions. Rather the differentiations in timing were intentionally incorporated into the Rule to afford the trial judge the maximum opportunity to consider with care a pending acquittal motion." United States v. Martin Linen, supra, at 574, 97 S. Ct. at 1356, 51 L. Ed. 2d at 653.

Accordingly, the Court looked to the substantive effect of the District Court's judgments. In deciding under Rule 29 whether the evidence was insufficient, the District Court was required to apply the following test: "[T]he District Judge must consider the evidence in the light most favorable to the Government . . . together with all inferences which may reasonably be drawn from the facts . . . . The determining inquiry is whether there is substantial evidence upon which a jury might reasonably base a finding that the accused is guilty beyond a reasonable doubt. [citations omitted]" Blachly v. United States, 380 F. 2d 665, 675 (5th Cir. 1967). The District Court's judgments of acquittal thus "represent[ed] a resolution . . . [that] . . . the factual elements of the offense[s] charged could only

be resolved in the defendant's favor. United States v. Martin Linen Supply Company, supra at 571, 97 S. Ct. at 1355, 51 L. Ed. 2d at 651. The conclusion followed that the District Court's rulings that the evidence was insufficient to sustain a conviction were acquittals within the meaning of the Double Jeopardy Clause:

> There can be no question that the judgments of acquittal entered here by the District Court were "acquittals" in substance as well as form. The District Court plainly granted the Rule 29(c) motion on the view that the Government had not proved facts constituting criminal contempt.[10] The court made only too clear its belief that the prosecution was "'the weakest [contempt case that] I've ever seen." 534 F. 2d, at 587. In entering the judgments of acquittal, the court also recorded its view that "'the Government has failed to prove the material allegations beyond a reasonable doubt'" and that "'defendant should be found "not guilty."'"

Thus, it is plain that the District Court in this case evaluated the Government's evidence and determined that it was legally

insufficient to sustain a conviction.

Id. at 572, 97 S. Ct. at 1355, 51 L. Ed. 2d at 651 (footnote omitted).

The Court therefore held:

> We thus conclude that judgments under Rule 29 are to be treated uniformly and, accordingly, the Double Jeopardy Clause bars appeal from an acquittal entered under Rule 29(c) no less than under Rule 29(a) or (b).

Id. at 575, 97 S. Ct. at 1356, 51 L. Ed. 2d at 653.

In Burks v. United States, supra, the Court extended the principle laid down in Martin Linen by holding that the Double Jeopardy Clause bars retrial following an appellate reversal of a conviction on the ground that the evidence was insufficient to sustain a conviction. The Court reasoned:

> [S]uch an appellate reversal means that the government's case was so lacking that it should not have even been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal -- no matter how erroneous its decision -- it is difficult to conceive how society has any

> greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.
>
> Id. at 16, 98 S. Ct. at 2150, 57 L. Ed. 2d at 12-13.

The Court explained that its decision was only fair: "[W]hen a defendant's conviction has been overturned due to a failure of proof at trial, . . . the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble." Id. at 15, 98 S. Ct. at 2149, 57 L. Ed. 2d at 12. See also Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981); United States v. DiFrancesco, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980).

Since Burks and Martin Linen, the Court has repeatedly reaffirmed the principle that a ruling that the evidence was insufficient is an acquittal for double jeopardy purposes. See Tibbs

v. Florida, 452 U.S. 31, 41, 102 S. Ct. 2211, 2218, 72 L. Ed. 2d 652, 661 (1982) ("A reversal based on the insufficiency of the evidence [bars retrial] because it means that no rational factfinder could have voted to convict the defendant."); Hudson v. Louisiana, 450 U.S. 40, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981) (Trial court's order for new trial based on insufficiency of evidence bars retrial); United States v. Scott, supra, at 91, 98 S. Ct. at 2194, 57 L. Ed. 2d at 74 ("A judgment of acquittal . . . based . . . on a ruling by the court that the evidence is insufficient to convict, may not be appealed . . . . [footnote omitted]").

We believe that the principles laid down by the United States Supreme Court in Martin Linen and its progeny compel the conclusion that the Pennsylvania

rule permitting the Commonwealth to appeal from an order sustaining a demurrer contravenes the Double Jeopardy Clause.[2]

First, the defendant has fulfilled both of the threshold conditions that must be fulfilled before one may invoke the protection of the Double Jeopardy Clause. For since the defendant may not demur to the Commonwealth's evidence until the close of the Commonwealth's

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[2]We are not constrained from so concluding by Pennsylvania Supreme Court decisions holding that the Commonwealth may appeal from an order sustaining a demurrer, for those decisions did not address the implications of Martin Linen and its progeny. See Commonwealth v. Franklin, 172 Pa. Super. 152, 92 A. 2d 272 (1952) (Where recent United States Supreme Court decisions compel conclusion that earlier Pennsylvania Supreme Court decisions permitting imposition of peace bond following acquittal contravene due process of law, Superior Court not constrained from so holding). And see Commonwealth v. Wimberly, supra (dictum assuming that order sustaining demurrer is appealable; no consideration of whether assumption is valid in light of Martin Linen; held, appeal should be dismissed under rule prohibiting appeal from de facto acquittal).

case, a defendant whose demurrer has been sustained has been placed in jeopardy; and a successful appeal by the Commonwealth necessitates a new trial, Commonwealth v. Wimberly, supra, at 172, 411 A. 2d at 1194, or at the very least, "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged . . . . " United States v. Jenkins, supra, at 370, 95 S. Ct. at 1013, 43 L. Ed. 2d at 259.

Second, an order sustaining a demurrer to the Commonwealth's evidence is not distinguishable in any significant way from the Rule 29 judgment of acquittal held to be an acquittal for double jeopardy purposes in Martin Linen. In Martin Linen, the District Court did precisely what a Pennsylvania trial court

does in sustaining a demurrer.[3] Compare Blachley v. United States, supra, at 675 ("[T]he District Judge must consider the evidence in the light most favorable to the Government . . . together with all inferences which may reasonably be drawn from the facts . . . . The determining inquiry is whether there

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[3]Although the District Court had before it the evidence presented by both sides -- the court entered its judgment of acquittal after the jury was unable to agree -- the Supreme Court expressly found that its conclusion that the evidence was insufficient was based solely on the Government's evidence: "Thus, it is plain that the District Court in this case evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." Id. at 572, 97 S. Ct. at 1355, 51 L. Ed. 2d at 651 (footnote omitted) (emphasis added). Furthermore, although a Rule 29(c) acquittal is entered at a later procedural stage than an order sustaining a demurrer, the Supreme Court held, as already mentioned, supra, that the timing of the acquittal is irrelevant for double jeopardy purposes: "We thus conclude that judgments under Rule 29 are to be treated uniformly and, accordingly, the Double Jeopardy Clause bars appeal from an acquittal entered under Rule 29(c) after a jury mistrial no less than under Rule 29(a) or (b)." Id. at 575, 97 S. Ct. at 1356, 51 L. Ed. 2d at 653.

is substantial evidence upon which a jury might reasonably base a finding that the accused is guilty beyond a reasonable doubt. [citations omitted]") with Commonwealth v. Wimberly, supra, 488 Pa. at 171, 411 A. 2d at 1194 ("In ruling on a demurrer, the proper test to be applied by the trial court is whether the Commonwealth's evidence and all reasonable inferences therefrom is sufficient to support a finding by the trier of fact that the accused is guilty beyond a reasonable doubt. [citation omitted]").

And finally, to permit the Commonwealth to appeal from an order sustaining a demurrer while prohibiting an appeal from an acquittal creates the same anomaly that the Supreme Court in Burks held must be avoided: An acquittal bars reprosecution even though the

fact-finder might have been rationally persuaded by the prosecution's case. There can therefore be no conceivable justification for permitting reprosecution when the evidence was so weak that the fact-finder could not have been rationally persuaded by the prosecution's case.

APPEALS QUASHED.

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

DESPINA SMALIS, a/k/a PEPE SMALIS,
Appellee

Nos. 12, 14, 45 & 47 Pittsburgh 1981

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

ERNEST SMALIS, a/k/a ANASTASIOS SMALIS,
Appellee

Nos. 13, 15, 46 & 48 Pittsburgh 1981

ORDER

AND NOW, this 8th day of July, 1983, it is ordered as follows:

Appeals Quashed.

IN THE COURT OF COMMON PLEAS OF

ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)
	)
VS	) CC 800-0931
	) CC 800-1211
ERNEST SMALIS, a/k/a	)
ANASTASIOS SMALIS	)
	)
AND	)
	)
DESPINA SMALIS, a/k/a	) CC 800-0930
PEPE SMALIS	) CC 800-1209
	) CC 800-1208

OPINION

Henry R. Smith, Jr., Judge

January 29, 1982

HISTORY OF THE CASE

The above named defendants, Ernest and Despina Smalis, were arrested and charged in the several informations listed above as follows:

Informations re: Ernest Smalis

CC 800-0931

1st. Criminal Homicide
Victim - Judith Ann Ross
2nd. Criminal Homicide
Victim - Dale Burton

CC 800-1211

1st. Recklessly Endangering Another Person
Victim - Brenda Johnson
2nd. Recklessly Endangering Another Person
Victim - Michael Marshall

3rd. Causing Catastrophe at
113 Oakland Ave./112 Bouquet St.
4th. Causing Catastrophe at
112 Bouquet St./113 Oakland Ave.

5th. Failure to Prevent Catastrophe at
113 Oakland Ave./112 Bouquet St.

Informations re: Despina Smalis

CC 800-0930

1st. Criminal Homicide
Victim - Judith Ann Ross
2nd. Criminal Homicide
Victim - Dale Burton

CC 800-1209

1st. Recklessly Endangering Another Person
Victim - Brenda Johnson
2nd. Recklessly Endangering Another Person
Victim - Michael Marshall

3rd. Causing Catastrophe at
113 Oakland Ave./112 Bouquet St.
4th. Causing Catastrophe at
112 Bouquet St./113 Oakland Ave.

5th. Failure to Prevent Catastrophe at
113 Oakland Ave./112 Bouquet St.

CC 800-1208 - Offense date: 7/27/77

1st. Securing Execution of Documents
by Deception.

These charges arose as the result of a fire which occurred at the "Chances R", an establishment owned by the defendants, in the Oakland area of the City of Pittsburgh. The "Chances R" restaurant and bar had two entrances at 113 Oakland Avenue and at 112 Bouquet Street. The several victims listed were tenants of the several apartments above the "Chances R." Although the defendants were not charged with arson or conspiracy, it was the Commonwealth's theory that the defendants committed arson by starting the fires at the "Chances R" which resulted in the deaths of two occupants of the building and recklessly endangered two other occupants.

Prior to trial, both defendants waived their right to trial by jury, and elected to proceed without a jury. Following the conclusion of the

Commonwealth's case in chief, counsel for both defendants demurred to all of the charges. The court sustained the demurrer as to each defendant on the following charges: murder of the first, second and third degree, voluntary manslaughter; and the two counts of causing catastrophe. The court denied the motions for demurrer as to all other charges.

Thereafter, the defense and the Commonwealth petitioned for reconsideration of the demurrer order of this court. The court granted the requests and allowed each counsel to re-argue the motions for demurrer and the Commonwealth to respond. After a review of the record and briefs submitted by counsel, and consideration thereof, the court sustained the original demurrer order in all respects. The Commonwealth

then filed an appeal from the order of this court granting the motions for demurrer.

Prior to the beginning of the trial, the Commonwealth and the defendants had agreed to consolidate for trial other charges arising out of a fire at the "Moonraker" restaurant, located in Monroeville, which was owned and operated by the defendants. Following the court's ruling on the demurrers, the Commonwealth filed a Motion to Stay the proceedings on all charges which had been consolidated for trial. In the exercise of its discretion, the court ordered that the trial of the several informations arising from the two separate occurrences be severed; and that the charges arising out of the "Chances R" fire be stayed pending disposition of the Commonwealth's appeal; and that the charges arising

out of the unrelated "Moonraker" fire proceed to verdict. This opinion relates to the granting of the demurrers with respect to the "Chances R" fire.

DISCUSSION

The Commonwealth excepted generally to the granting of the demurrers to the two counts of Criminal Homicide and the two counts of Causing a Catastrophe as to each defendant. The court notes that an order granting a demurrer is purely a question of law, and that the Commonwealth may appeal from an adverse ruling thereon. COMMONWEALTH v. WIMBERLY, [488 Pa. 169,] 411 A. 2d 1193 (1979). The test applied by this court in ruling on the defendants' demurrers was whether the evidence presented by the Commonwealth and the reasonable inferences deductible therefrom, were sufficient to find the defendant guilty beyond a reasonable

doubt of the various crimes charged. WIMBERLY, supra, at 1194; COMMONWEALTH v. DUNCAN, 473 Pa. 62, 373 A. 2d 1051 (1977).

The Commonwealth charged each defendant with two counts of criminal homicide and attempted to prove that the defendants were guilty of criminal homicide by setting or causing to be set a fire at the "Chances R" restaurant and bar, which resulted in the deaths of two of the tenants on the second floor of the building. Although the Commonwealth did not charge arson, it proceeded on the theory that the defendants had committed arson which resulted in the deaths.

The Commonwealth evidence established that the building located at 113 Oakland Avenue/112 Bouquet Street, Pittsburgh, which housed the "Chances R" restaurant

and the apartments on the second floor, was owned by the defendants and that the building caught fire at approximately 6:45 AM on the morning of February 12, 1979. Further, the evidence and testimony introduced by the Commonwealth through expert witnesses were sufficient to establish that the fire which occurred was incendiary in origin.

It is at this point, however, that the Commonwealth's case is wanting for sufficiency of evidence with respect to the culpability of the defendants. As the trier of fact and law, the court was not satisfied, after considering all of the facts together with all reasonable inferences which the Commonwealth's evidence tended to prove, that there was sufficient evidence from which it could be concluded that either of the defendants was guilty beyond a

reasonable doubt of setting or causing to be set the fire in question.

The Commonwealth presented substantial evidence seeking to establish that the defendants had various motives for wanting the premises and business destroyed by fire. The Commonwealth introduced evidence to establish that, prior to the fire, the defendants' restaurant business had fallen off drastically and that the defendants had begun to cut back on orders. The Commonwealth alleged that the defendants desired to have the building and business destroyed in order to collect insurance proceeds.

The Commonwealth further alleged that the defendants were seeking to avoid the enforcement of regulations and the rent escrow imposed by the Health Department of Allegheny County. Because

of the numerous and repeated violations of the local Health Code, the Health Department ordered rent withholding on December 27, 1978, in favor of Malcolm Taylor, Tina Brooks, and Laura Brown, tenants of the second floor of the building. A hearing on the existing violations was scheduled for February 12, 1979, the day of the fire.

The Commonwealth also contended that the defendants were motivated by spite and anger with the tenants, namely Malcolm Taylor, Tina Brooks and Laura Brown. These several individuals all filed formal complaints with the Allegheny County Health Department concerning the conditions at 113 Oakland Avenue/112 Bouquet Street. The formal complaints filed by these several tenants, and their predecessors, resulted in aforementioned rent escrow. Finally, the Commonwealth

contended that the defendants had a personal animosity toward one tenant, Malcolm Taylor, because Mr. Taylor was the leader in the successful efforts to obtain rent withholding, with provided the basis of a final motive.

The court notes that, while evidence of motive is generally admissible, COMMONWEALTH v. COSTANZO, [269 Pa. Super. 413,] 410 A. 2d 324 (1979), the Commonwealth is not required to prove motive, nor is proof of motive alone sufficient to establish guilt. COMMONWEALTH v. BRANTNER, [486 Pa. 518,] 406 A. 2d 1011 (1979). Whether or not the trier of fact could believe and accept any or all of the motives profferred by the Commonwealth showing why the defendants might want to have their establishment burn, evidence as to who in fact set or caused to be set the fire

in question was insufficient. The court will not conjecture where evidence is wanting.

The Commonwealth called only two witnesses, Nick Leventis and William Kline, who gave any testimony that might be considered to tend to link either defendant to the fire. Nick Leventis, an employee of the "Chances R" testified (Testimony Vol. #4801, Nov. 12-20, 1980, pages 474-477) that several people had a key to the doors on Bouquet Street and on Oakland Avenue, namely: the C & R maintenance people, Despina Smalis, Ernest Smalis and the day barmaid (Testimony - page 474). It would be expected that both defendants, as owners, would have keys and no inference of guilt may be drawn from the fact that each possessed keys.

Another Commonwealth witness was

William Kline, who was employed by the University of Pittsburgh as a security supervisor and who was on duty in a building about 1/2 block away from 112 Bouquet Street. He testified (Testimony, Vol. #4801, pages 522-528), that he was able to see the Bouquet Street entrance to the "Chances R" from his place of work through a window; that he observed someone exit the double red doors on Bouquet Street of the "Chances R" at 4:30-5:00 AM carrying something; that the person he observed was a man six foot tall, muscular, well built with a dark trench coat; that he observed another person 20 minutes later come up Bouquet Street and knock on the red doors to "Chances R", at which point someone inside stuck his head out and then let the person in (page 528); that several moments later he saw another

individual, who was not as tall, nor as muscular as the first person, and who wore a light tan coat (page 531) exit through the red doors of "Chances R" and go to the right along the side of the building; that he later observed the second individual knocking on the red doors and being admitted (page 533); and that about forty minutes to one hour later, he observed a fireball shoot from the side of the Bouquet Street building at the second floor level (page 537). The witness Kline was unable to identify either of the individuals he saw. His testimony is not sufficiently definite to establish that the persons that he saw were both or either one of the defendants. On the other hand his testimony tends to prove that an unknown person may have been involved, since his description of a person six foot

tall would not apply to either defendant.

Circumstantial evidence may provide the basis for a conviction. However, where a conviction is based entirely upon circumstantial evidence, the theme of guilt must flow from the facts and circumstances proved and be consistent with them all. COMMONWEALTH v. LANG, [470 Pa. 204,] 368 A. 2d 265 (1977). Other than motive, the Commonwealth failed to produce any circumstantial evidence that would link the defendants to the cause of the fire. If the conviction is based wholly upon inferences, suspicion and conjecture it cannot stand. On the basis of the evidence presented, in the case at bar, the trier of fact would have had to guess who set the fire or caused the fires to be set.

Merely because a fire was determined to be of incendiary origin, and because

both or either of the owners had motive, does not a fortiori mean that the owner(s) can be held liable. The evidence, direct and circumstantial, must be of a sufficient quantity and quality from which a factfinder could find either or both guilty beyond a reasonable doubt. COMMONWEALTH v. DAWSON, [464 Pa. 254,] 346 A. 2d 545 (1975).

The circumstantial evidence and the reasonable inferences arising therefrom do not establish that either or both the defendants were the guilty person or persons. COMMONWEALTH v. COLON, [264 Pa. Super. 314,] 399 A. 2d 1068 (1979). Therefore, the court sustained the motion for a demurrer to the charges of murder and voluntary manslaughter as to each of the defendants.

The Commonwealth further charged that each defendant "intentionally or

knowingly caused a catastrophe . . . by fire" under Section 3302(a), and in a separate count that each defendant "recklessly caused a catastrophe . . . by fire under Section 3302(b). In order for either defendant to be found guilty of the charge, the Commonwealth had the burden of proving that either or both of the defendants were the person or persons responsible for causing the catastrophe by fire. For the foregoing reasons, the Commonwealth's evidence was not sufficient to establish that either or both of the defendants were the person or persons responsible for the fire. Thus, the sustaining of the demurrer to those charges was proper.

CONCLUSION

After a review of the entire record and allowing the Commonwealth all reasonable inferences from the evidence,

the court was not convinced that the Commonwealth's evidence was sufficient to find either defendant guilty beyond a reasonable doubt of any of the charges included in the court's ruling on the demurrer motions. Therefore, the court's order sustaining demurrers to the several charges should be affirmed.

IN THE COURT OF COMMON PLEAS OF

ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA)	
)	
VS)	CC 800-0931
)	CC 800-1211
ERNEST SMALIS, a/k/a)	
ANASTASIOS SMALIS)	
)	
AND)	
)	
DESPINA SMALIS, a/k/a)	CC 800-0930
PEPE SMALIS)	CC 800-1209
)	CC 800-1208

ORDER

[T]he following rulings are made with respect to the general demurrers: With respect to Despina Smalis at CC8000930 . . . the criminal homicide charges[,] the demurrer is sustained as to all charges with the exception of involuntary manslaughter, the demurrer is denied as to involuntary manslaughter. . . . With respect to Ernest Smalis . . . my ruling is as follows: As to CC8000931,

as to murder of the first degree, the demurrer is sustained. As to murder of the second degree, the demurrer is sustained. As to murder of the third degree the demurrer is sustained. As to voluntary manslaughter the demurrer is sustained. . . . As to the third and fourth counts (of CC8001211), causing a catastrophe, the demurrer is sustained.

[December 19, 1980; transcript of proceedings held December 15, 17, and 19, 1980 at 100-01.]

IN THE COURT OF COMMON PLEAS OF

ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	
VS	CC 800-0931 CC 800-1211
ERNEST SMALIS, a/k/a ANASTASIOS SMALIS	
AND	
DESPINA SMALIS, a/k/a PEPE SMALIS	CC 800-0930 CC 800-1209 CC 800-1208

ORDER

[T]he Court has determined that the ruling previously made was appropriate and proper, and any further reconsideration would be denied; and the Order and rulings with respect to the demurrers remain as they were.

[January 8, 1981; transcript of proceedings held January 5 through January 20, 1981 at 63.]

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

DESPINA SMALIS, a/k/a PEPE SMALIS,
Appellee

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

ERNEST SMALIS, a/k/a ANASTASIOS SMALIS,
Appellee

No. 62 W.D. Appeal Dkt. 1984

JUDGMENT

March 29, 1985

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the SUPERIOR COURT OF PENNSYLVANIA be, and the same is, hereby Reversed and Remanded to Superior Court.

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

DESPINA SMALIS, a/k/a PEPE SMALIS,
Appellee

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

ERNEST SMALIS, a/k/a ANASTASIOS SMALIS,
Appellee

No. 62 W.D. Appeal Dkt. 1984

ORDER

PER CURIAM

Application for Reargument Denied.

June 11, 1985

OPPOSITION

BRIEF

(2)

NO. 85-227

IN THE

SUPREME COURT OF THE UNITED STATES

DESPINA SMALIS and ERNEST SMALIS,

Petitioners

VS.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

On Petition for a Writ of Certiorari
to the Supreme Court of Pennsylvania

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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401

QUESTION PRESENTED FOR REVIEW

I. Whether the Pennsylvania Supreme Court correctly held that double jeopardy principles do not prohibit the long-recognized right of the Commonwealth to appeal the grant of a defense demurrer in light of the special nature of a demurrer under Pennsylvania practice as a pure question of law?

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No. 85-227

IN THE

SUPREME COURT OF THE UNITED STATES

DESPINA SMALIS and ERNEST SMALIS,

Petitioners

V.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

OPINIONS BELOW

The Opinion of the Pennsylvania Supreme Court, which is attached to the Petition for Writ of Certiorari filed by the petitioners, is reported at ___ Pa. ___, 490 A.2d 394 (1985). The Opinion of the Superior Court of Pennsylvania is reported

at 331 Pa. Super. 307, 480 A.2d 1046 (1984).

STATEMENT OF JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Based upon a presentment of an investigating grand jury, petitioners, husband and wife, were each charged with criminal homicide (two counts), recklessly endangering another person (two counts), causing catastrophe, and failure to prevent catastrophe. Petitioner Despina Smalis was also charged with securing execution of documents by deception. The charges arose out of a fatal fire that occurred February 12, 1979 in a building, owned by petitioners, which contained a bar-restaurant and seven dwelling units.

Trial without a jury began on November 12, 1980 in the Court of Common Pleas of Allegheny County, Pennsylvania. At the close of the Commonwealth's case, on December 19, 1980, the trial court sustained demurrers with respect to the charges of murder, voluntary manslaughter, and causing catastrophe as to both petitioners. Demurrers were denied as to the remaining charges.

An appeal to the Pennsylvania Superior Court was then filed from the orders sustaining the demurrers. Reconsideration of the orders was also sought. The trial court granted reconsideration but reaffirmed its original orders on January 8, 1981. The Commonwealth then appealed from the reaffirmance of the orders. The trial court, by order entered January 9, 1981, granted a

Commonwealth motion to stay further proceedings on the remaining charges pending disposition of the appeals. The Superior Court consolidated the appeals.

A Motion to Quash Appeal was filed in the Superior Court contending that appellate review was barred by the Double Jeopardy Clause. On May 11, 1981 the Superior Court denied that motion without prejudice to raise the issue of appealability in the brief on the merits.

On July 8, 1983, a panel of the Superior Court quashed the appeals on double jeopardy grounds. The Commonwealth successfully sought reargument before the Superior Court of Pennsylvania, sitting en banc which, with one judge dissenting, on June 29, 1984, entered an Order quashing the Commonwealth's appeal.

The Supreme Court of Pennsylvania granted the Commonwealth's request for review and consolidated the case with Commonwealth v. Zoller, wherein the Superior Court had rendered a decision (reported at 318 Pa. Super. 402, 465 A.2d 16) quashing a similar appeal on the basis of the panel decision in the instant case. After briefing and argument, the Pennsylvania Supreme Court, on March 29, 1985, reversed the Superior Court decisions quashing the appeals, remanded the instant case to the Superior Court for consideration of the merits of the appeals, and remanded the Zoller case to the trial court for a new trial, the Superior Court having earlier found that the order sustaining the demurrer in that case was erroneously entered. Petitioners filed an Application for Reargument, which the

Pennsylvania Supreme Court denied on June 11, 1985.

Thereupon, petitioners filed a Petition for Writ of Certiorari to this Honorable Court.

REASONS FOR DENYING THE WRIT

Petitioners request discretionary review of a decision of the Supreme Court of Pennsylvania holding that the Double Jeopardy Clause is not offended by recognizing the Commonwealth's long-standing right to appeal a trial court's order granting a demurrer, since said order is "purely a question of law" unrelated to a defendant's factual guilt or innocence; and is not prohibited by this Honorable Court's decisions in United States v. Scott, 437 U.S. 332 (1978); and United

States v. Martin Linen Supply Company, 430 U.S. 564 (1977).

"[T]he most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'" United States v. Scott, supra, at 90, quoting United States v. Martin Linen Supply Company, supra, at 571; United States v. Ball, 163 U.S. 662, 671 (1896).

In defining "acquittal" this Court has stated "[a] defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charg-

ed.'" Scott, supra, at 97, quoting Martin Linen Supply Company, supra, at 571.

In Martin Linen Supply Company, a Federal District Court Judge entered a Judgment of Acquittal pursuant to Fed. R. Crim. P. 29(c), after a "hopelessly deadlocked" jury was dismissed. This Court, in holding that the Judgment of Acquittal was not appealable stated:

> There can be no question that the judgments of acquittal entered here by the District Court were 'acquittals' in substance as well as form. The District Court plainly granted the Rule 29(c) motion on the view that the Government had not proved facts constituting criminal contempt. The court made only too clear its belief that the prosecution was 'the weakest [contempt case that] I've ever seen.' 534 F.2d, at 587. In entering the judgments of acquittal, the court also recorded its view that 'the Government has failed to prove the material allegations beyond a reasonable doubt' and that 'defendant should be found "not guilty."'

> Thus, it is plain that the District Court in this case evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction.

Id., at 572, (footnotes omitted) (emphasis added). But cf. Arizona v. Manypenny, 451 U.S. 232, rehg. den. 452 U.S. 955 (1981) (State has a right to appeal a post-guilty-verdict judgment of acquittal, entered pursuant to Fed. R. Crim. P. 29(c), in an action removed to Federal Court, where such an appeal was authorized by state law.).

The Commonwealth respectfully submits that a demurrer, as it exists in Pennsylvania Criminal Procedure, is not the functional equivalent of a judgment of acquittal under Fed. R. Crim. P. 29. Rather, as the Pennsylvania Supreme Court held in Commonwealth v. Zoller, ___ Pa. ___, ___, 490 A.2d 394, 401 (1985)

(citations omitted), "[B]y definition, a demurrer is not a factual determination . . . . '[t]he object of a demurrer to the evidence is to ascertain the law on an admitted state of facts.' . . . Thus, the question before the trial judge in ruling on a demurrer remains purely one of law." A trial judge may not pass upon the credibility of Commonwealth witnesses at the demurrer stage of the proceedings, Commonwealth v. Wimberly, 488 Pa. 169, 411 A.2d 1193 (1979), rearg. den. March 25, 1980, nor may he engage in weighing the Commonwealth's evidence. Commonwealth v. Kelly, 237 Pa. Super. 468, 352 A.2d 127 (1975), alloc. den. February 23, 1976.

The above-described motion for a demurrer to the evidence is a common law practice with roots deeply imbedded in early English and American law. Black-

stone in his Commentaries on the common law characterizes the demurrer as an "issue as to law," as distinguished from an "issue of fact":

> An issue upon matter of law is called a demurrer; and it confesses the facts to be true, as stated by the opposite party; . . . . As, if the matter of the plaintiff's complaint or declaration be insufficient in law, . . . then the defendant demurs to the declaration. . . . [emphasis supplied].

Cooley's Blackstone at 1091 (4th Ed.). (Compare: "An issue of fact is where the fact only, and not the law, is disputed . . . . And this issue of fact must, generally speaking, be determined, not by the judge of the court, but by some other method; the principal of which methods is that by the country, per pais, that is, by jury." Id. at 1092).

The common law demurrer described by Blackstone is in all material respects

identical in nature to the demurrer currently part of Pennsylvania criminal procedure.[1] Thus, the question before the trial judge in ruling on a demurrer remains purely one of law; and is no different from other rulings of law which are appealable by the Commonwealth. Illinois

---

1 The right of a criminal defendant to demur to the Commonwealth's evidence was statutorily granted for approximately forty-five (45) years. 19 P.S. §481, Act of June 5, 1937, P.L. 1703, No. 357, §1. This statute was repealed by the Judiciary Act Repealer Act, 42 Pa. C.S. §20002(a), Act of April 28, 1978, P.L. 202, No. 53, §2; as affected by the Act of Dec. 20, 1982, P.L. 1409, No. 326, Art. IV, 317. Despite the repeal of this section, the demurrer was preserved as part of the common law. 42 Pa. C.S. §20003(b). On January 28, 1983, the Pennsylvania Supreme Court adopted Pa. R. Crim. P. 1124, effective July 1, 1983, which currently governs the defendant's right to move for a demurrer to the evidence.

v. Somerville, 410 U.S. 458 (1973); United States v. Morrison, 429 U.S. 1 (1976); Commonwealth v. Bosurgi, 411 Pa. 56, 190 A.2d 304 (1963); Commonwealth v. White, 482 Pa. 197, 393 A.2d 447 (1978).

Because a demurrer represents a purely legal determination, it is necessarily distinct from an acquittal, which represents a determination of fact. "[A] defendant is acquitted only when 'the ruling of the judge [or finding of the jury], whatever its label, actually represents a resolution [in the defendant's favor] correct or not, of some or all of the factual elements of the offense charged.'" (emphasis supplied). United States v. Scott, supra, at 97, citing United States v. Martin Linen Supply Company, supra, at 571.

The Commonwealth respectfully directs this Court's attention to its decision in Arizona v. Manypenny, supra, at 232. In Manypenny, this Court, in upholding a state's right to appeal from a post-guilty-verdict judgment of acquittal, entered pursuant to Fed. R. Crim. P. 29(c), in an action removed to Federal Court, stated that "[i]f a state wishes to empower its prosecutors to pursue a criminal appeal under certain circumstances, it is free so to provide, limited only by the guarantees afforded the criminal defendant under the Constitution." Id. at 249. This Court further stated that "[b]ecause the regulation of crime is preeminently a matter for the states, we have identified 'a strong judicial policy against federal interference with state criminal proceedings.'" Manypenny, id. at

243, citing Huffman v. Pursue, Ltd., 420 U.S. 592, 600 (1975).

It can therefore be concluded that this Court did not intend its prior decisions dealing with unique federal procedure to be totally binding upon a state practice such as that under consideration in the matter at bar.

Pa. R. Crim. P. 1124 provides four (4) distinct mechanisms by which a defendant may challenge the sufficiency of the evidence:

> (a) A defendant may challenge the sufficiency of the evidence to sustain a conviction of one or more of the offenses charged by a:
>
> (1) demurrer to the evidence presented by the Commonwealth at the close of the Commonwealth's case-in-chief;
>
> (2) motion for judgment of acquittal at the close of all the evidence;

> (3) motion for judgment of acquittal filed within ten (10) days after the jury has been discharged without agreeing upon a verdict; or
>
> (4) motion in arrest of judgment filed within ten (10) days after a finding of guilt.

A defendant, by moving for a demurrer rather than availing himself of a motion for judgment of acquittal under Pa. R. Crim. P. 1124(a)(2) or (3), voluntarily choses to seek determination of the proceeding solely on a basis of law, unrelated to factual guilt or innocence. Before making the choice, a defendant is aware that should the trial court err as a matter of law in granting his motion for demurrer, that decision is subject to appeal.

> Federal courts should not be quick to conclude that simply because a state procedure does not conform to the corresponding federal statute or rule, it does not serve a legitimate state pol-

> icy. Last Term, recognizing this fact, we dismissed a writ of certiorari as improvidently granted in a case involving a claim of double jeopardy stemming from the dismissal of an indictment under the 'rules of criminal pleading peculiar to' an individual state followed by a retrial under a proper indictment.

Illinois v. Somerville, supra, at 468.

As this Court stated in Sanabria v. United States, 437 U.S. 54, 66 (1978):

> While form is not to be exalted over substance in determining the double jeopardy consequences of a ruling terminating a prosecution, Serfass v. United States, supra, 420 U.S., at 377, 392-393, 95 S.Ct. at 1057 (1975); United States v. Jorn, 400 U.S. 470, 478 n. 7, 91 S.Ct. 547, 553, 27 L.Ed. 2d 543 (1971); United States v. Goldman, 277 U.S. 229, 236, 48 S.Ct. 486, 488, 72 L.Ed.2d 862 (1928), neither is it appropriate entirely to ignore the form of order entered by the trial court, see United States v. Barber, 219 U.S. 72, 78, 31 S.Ct. 209, 211, 55 L.Ed. 99 (1911).

Should a trial judge in Pennsylvania, when deciding to grant a demurrer,

actually rule on some of the factual elements of the offense charged, rather than deciding the issue as purely one of law, appellate courts will treat the ruling as a de facto judgment of acquittal and bar any appeal due to double jeopardy considerations. See Commonwealth v. Wimberly, supra, at 172, 173, 411 A.2d at 1194, 1195 (Trial court in sustaining a demurrer stated that "This Court, as a fact-finder, rejects as not being credible or worthy of belief that portion of the testimony which contradicted the statement of the defendant." The Pennsylvania Supreme Court in refusing to allow the Commonwealth to appeal the lower court's granting of the demurrer, stated: "The trial court in the instant case, while characterizing its action as the granting of a demurrer, actually entered a de facto judgment of

acquittal . . . . Accordingly the Commonwealth's appeal in the instant case must be dismissed.").

This Court has recognized the ability of courts to make the type of distinctions required in deciding whether a demurrer has been properly granted and hence appealable, or whether the trial court actually entered a de facto acquittal. "[T]his Court has had no difficulty in distinguishing between those rulings which relate to 'the ultimate questions of guilt or innocence' and those which serve other purposes . . . . We reject the contrary implication of the dissent that this Court or other courts are incapable of distinguishing between the latter and the former." Scott, supra, at 98, n. 11 (citations omitted).

In addressing the scope of the Double Jeopardy Clause, this Court has noted that the clause provides criminal defendants with three related protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 396 U.S. 711, 717 (1969); United States v. Wilson, 420 U.S. 332, 343 (1975).

In the case at bar, the recommencement of trial proceedings subsequent to the reversal of the orders sustaining the appellees' demurrers would not contravene any of the protections of the Double Jeopardy Clause as enumerated in North Carolina v. Pearce, supra. The appellees

would not be subject to a second trial after acquittal, nor, of course, would they be subject to a second trial after conviction. As Judge Johnson of the Pennsylvania Superior Court correctly noted in his dissenting Opinion:

> The procedural posture of the instant case reveals that no danger of a second trial is present if the Commonwealth is permitted to appeal the instant orders. The trial court merely sustained appellees' demurrers to the charges. No dismissal of these charges nor discharge of appellees as to these counts occurred. In fact, the remaining charges concerning the Chances R fire were stayed, pending the resolution of this appeal.

Commonwealth v. Smalis, ___ Pa. Super. __, ___, 480 A.2d 1046, 1055 (1984) (Johnson, J. dissenting) (emphasis in the original). Thus, should this Court find that the Pennsylvania Supreme Court was correct in upholding the Commonwealth's right to appeal the demurrer, and should

the Superior Court rule that the lower court erred as a matter of law in granting the demurrer, the proceedings in the lower court would merely recommence at the stage where they were temporarily halted as a result of the within appeal, and, therefore, there clearly is no "danger of 'affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.'" Justices of Boston Municipal Court v. Lydon, ___ U.S. ___, 104 S.Ct. 1805, 1813 (1984).

This principle applies similarly to a jury trial which is interrupted by the improvident granting of a demurrer. The convening of a second jury following appellate reversal of the demurrer order would not constitute a second prosecution after acquittal or after conviction. Furthermore, the discharge of the jury

under these circumstances would result from a manifest necessity, and therefore retrial would be permissible. This Court has explained as follows the rationale for permitting retrial following the discharge of a jury by reason of a manifest necessity:

> Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges of the accused. Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.[16]

[16] In his opinion announcing the Court's judgment in United States v. Jorn, [400 U.S. 470, 479-480, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (19)], Mr. Justice Harlan explained why a rigid application of the 'particular tribunal' principal is unacceptable: '[A] criminal trial is, even in the best of circumstances, a complicated affair to manage. . . . [It is] readily apparent that a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide.'

Arizona v. Washington, 434 U.S. 497, 505 (1978). Under circumstances in which a jury is discharged as a result of an erroneous ruling of law by the trial judge prior to acquittal or conviction -- such as the improvident granting of a demurrer --, such discharge would be the result of a "manifest necessity," and therefore retrial before a new tribunal would be

appropriate and not violative of double jeopardy principles.

The Commonwealth suggests further that double jeopardy principles are not contravened where proceedings recommence following the appellate reversal of the trial court's improvident entry of a demurrer because, under such circumstances, jeopardy in fact never terminated. "In Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970), [the United States Supreme Court] recognized that implicit in the Ball[2] rule permitting retrial after reversal of a conviction is the concept of 'continuing jeopardy.' . . . That principle 'has application where criminal proceedings against an

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2 United States v. Ball, 163 U.S. 662 (1896).

accused have not run their full course.' . . . Interests supporting the continuing jeopardy principle involve fairness to society, lack of finality and limited waiver." Justices of Boston Municipal Court v. Lydon, supra, 104 S.Ct. at 1813-1814, citing Breed v. Jones, 421 U.S. 519 (1975). The "continuing jeopardy" principle may properly be applied in the instant case where in fact the proceedings against the petitioners have not in fact run their full course, but rather will recommence upon remand of the matter to the trial court. In accord with this principle is the fact that in moving for a demurrer, a defendant must be deemed to necessarily contemplate the potential results of such action. Certainly it is within the contemplation of defendants who move for a demurrer in the trial courts of Pennsyl-

vania that the erroneous sustaining of such motion will result in further proceedings should the order be reversed by a reviewing court. Thus, it can be concluded that a defendant knowingly bears the burden of retrial should an erroneous legal ruling be reversed and by moving for a demurrer must be deemed to have waived a subsequent double jeopardy claim.

Finally, the Comonwealth respectfully submits that the doctrine of "ripeness" as applied by this Court requires that petitioners' Petition for Writ of Certiorari be denied. The fact that further proceedings are to follow in the state court does not preclude this Court's treatment of the decision on the federal question asserted as a final judgment. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); North Dakota St. Bd. of Pharm.

v. Synder's Drug Stores, Inc., 414 U.S. 217 (1973). In the case at bar, however, the challenged Order effected a remand to the Superior Court for a determination as to whether the demurrer was properly granted. The Superior Court has yet to rule on the issue of the legal sufficiency of the evidence. Thus, the merits of the Commonwealth's appeal have yet to be determined. The Superior Court may well rule that, as a matter of law, the demurrer was properly granted.

In addition, should a new trial be necessary, petitioners would have the right to raise the double jeopardy issue in pretrial motions. Should that motion be denied, the order would be immediately appealable. Commonwealth v. Starks, 490 Pa. 336, 416 A.2d 498 (1980).

CONCLUSION

WHEREFORE, for the foregoing reasons, respondent Commonwealth of Pennsylvania submits that this Honorable Court should not exercise discretionary jurisdiction over the instant matter and should deny the petitioners' request that a writ of certiorari issue to the Pennsylvania Supreme Court.

Respectfully submitted,

ROBERT E. COLVILLE
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ROBERT L. EBERHARDT
DEPUTY DISTRICT
ATTORNEY FOR LAW

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that I am this 3rd day of October, 1985, serving the following persons by First Class Mail, postage prepaid, with three (3) true and correct copies of the within Brief for the Commonwealth of Pennsylvania in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania, which service satisfies the requirements of Rule 28:

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PETITIONER'S

BRIEF

(4)

NO. 85-227

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1985

DESPINA SMALIS and ERNEST SMALIS,

Petitioners

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Does the Double Jeopardy Clause permit a prosecution appeal from a ruling, made on defense motion at the close of the prosecution's case in a nonjury trial, that the evidence is insufficient as a matter of law to prove guilt?

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The opinion of the Supreme Court of Pennsylvania is published at 490 A. 2d 394. The en banc opinion of the Superior Court of Pennsylvania is published at 331 Pa. Super. 307, 480 A. 2d 1046.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered March 29, 1985; reargument was denied on June 11, 1985. Your Honorable Court has jurisdiction to review said judgment by writ of certiorari by virtue of the Act of June 25, 1948, c. 646, §1, 62 Stat. 928, 18 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which provides:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . .

STATEMENT OF THE CASE

Petitioners, husband and wife, were jointly charged with criminal homicide (two counts), recklessly endangering another person (two counts), causing catastrophe, and failure to prevent catastrophe. Petitioner Despina Smalis was also charged with securing execution of documents by deception. The charges arose out of a fatal fire that occurred February 12, 1979 in a building owned by petitioners.

Nonjury trial began on November 12, 1980 in the Court of Common Pleas of Allegheny County, Pennsylvania. At the close of the Commonwealth's case both petitioners demurred to the evidence. On December 19, 1980 the trial court sustained the demurrers with respect to murder, voluntary manslaughter, and causing catastrophe, finding that as a matter of law there was insufficient evidence to link the defendants to the setting of the fire. Demurrer was denied as to the remaining charges.

The Commonwealth appealed to the Superior Court of Pennsylvania from the orders sustaining the demurrers, and also sought reconsideration of the orders. The trial court granted reconsideration but reaffirmed its original orders on January 8, 1981. The Commonwealth then appealed from the reaffirmance of the orders. The court, by order entered

January 9, 1981, granted a Commonwealth motion to stay further proceedings on the remaining charges pending disposition of the appeals. The Superior Court consolidated the appeals.

On July 8, 1983, the Superior Court issued a decision quashing the appeals on double jeopardy grounds. The Commonwealth successfully sought reargument, which resulted in a court en banc decision, entered on June 29, 1984, affirming the panel's decision to quash.

The Commonwealth then filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania. The court granted the petition and consolidated the case with another one before it, Commonwealth v. Zoller, wherein the Superior Court had rendered a decision (reported at 318 Pa. Super. 402, 465 A. 2d 16) quashing a Commonwealth appeal

on the basis of the panel decision in the instant case. That court, by decision rendered March 29, 1985, reversed the Superior Court decision quashing the appeals, remanded the instant case to the Superior Court for consideration of the merits of the appeals, and remanded the Zoller case to the Court of Common Pleas of Beaver County, Pennsylvania for a new trial, the Superior Court having found that the order sustaining the demurrer in that case was erroneous before it found that double jeopardy barred the appeal. Petitioners filed an Application for Reargument, which the court denied on June 11, 1985. Your Honorable Court granted certiorari on November 4, 1985.

SUMMARY OF ARGUMENT

Pennsylvania's rule permitting prosecution appeals from orders sustaining demurrers to the evidence cannot be reconciled with the Double Jeopardy Clause. Review is prohibited because reversal would subject petitioners to further proceedings, in the form of retrial or resumption of bench trial, which would be directed at determining guilt or innocence and which would therefore place them back in jeopardy.

A credibility determination is not a prerequisite to an acquittal, and no waiver of double jeopardy rights occurs when a defendant challenges the sufficiency of the prosecution's evidence; such a challenge, by whatever name it may be called, goes to the merits of the case.

For this reason, an order sustaining a demurrer cannot be likened to a

declaration of mistrial so as to invoke the manifest necessity doctrine; no mistrial occurs when a trial is ended by an adjudication, however erroneous, of the issue tried.

ARGUMENT

The issue in this case is the appealability of an order sustaining a defense challenge to the sufficiency of the evidence when that challenge is made at the close of the prosecution's case in a nonjury criminal trial and the order does not reflect any determination of credibility or weight of evidence. It is the position of the petitioners that such an order is an acquittal notwithstanding that it is called an "order sustaining a demurrer" in Pennsylvania.

A demurrer, under present Pennsylvania practice, is an assertion that the prosecution's evidence, if accepted as true, is insufficient to prove guilt beyond a reasonable doubt. At one time it was a conclusive admission of the truth of that evidence, an admission that made conviction possible

at the close of the Commonwealth's case. A successful appeal by the prosecution of an order discharging the defendant at that stage of the proceedings resulted in the entry of a judgment of conviction by the appellate court and a remand for sentencing. Commonwealth v. Parr, 5 Watts & Sergeant 345 (1843).[1] A 1937

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[1]The rule permitting Commonwealth appeals from orders sustaining demurrers was established sub silentio in Parr one hundred and twenty-six years beofre Benton v. Maryland, 394 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969) applied the Double Jeopardy Clause to the states. A rationale for the rule was first set forth in Commonwealth v. Kolsky, 100 Pa. Super. 596 (1930); the Kolsky court called an order sustaining a demurrer a judgment of acquittal but stated that such an acquittal is reviewable because it presents "only a question of law." Id. at 599. In Commonwealth v. Heller, 147 Pa. Super. 68, 29 A. 2d 340 (1942) the court noted briefly in dictum that the 1937 change in demurrer procedure (note 2, infra) had not affected the right of the Commonwealth to appeal an order sustaining a demurrer. Heller represents the most recent discussion, prior to the Superior Court panel decision in the instant case, of the merits of the rule. See generally Strazzella, Commonwealth Appeals and Double Jeopardy, Pennsylvania Law Journal-Reporter, Vol. IV, Nos. 39-40, October 19 and 26, 1981. Professor Strazzella reaches the same conclusion as do the petitioners with respect to the validity of the rule.

statute[2] modified demurrer practice by permitting the defendant who demurred

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[2]The Act of June 15, 1937, P.L. 1703, No. 357, §1, 19 P.S. §481, provided in pertinent part:

> [H]ereafter in all criminal prosecutions, the action of the defendant at the close of the Commonwealth's case in demurring to the evidence submitted by the Commonwealth, shall not be deemed an admission of the facts which the evidence tends to prove or the inferences reasonably deductible [sic] therefrom except for the purpose of deciding upon such demurrer, and if the court shall decide against the defendant on such demurrer, such decision shall be deemed interlocutory only, and the case shall proceed as if such demurrer had not been made.

The foregoing statute was repealed by a legislative housecleaning project called the Judiciary Act Repealer Act, Act of April 28, 1978, P.L. 202, No. 53, §2, 42 Pa. C. S. §20002 [1194], as amended; §20003(b) of that Act, however, salvaged the spirit of the statute and the others that were repealed by the Act with the following language:

> If no...general rules are in effect with respect to the repealed statute on the effective date of its repeal, the practice and procedure provided in the repealed statute shall continue in full force and effect, as part of the common law of the Commonwealth, until such general rules are promulgated.

Pennsylvania Rule of Criminal Procedure 1124, paragraph (a) of which is set forth in notes 5 and 6 of the opinion below, 490 A. 2d at 400, 401, Appendix to Petition at 23a, 27a, was adopted January 28, 1983, effective July 1, 1983. With respect to demurrers to the evidence, it represents a codification of prior practice.

unsuccessfully to thereafter proceed with his defense as if no demurrer had been made, and this is the current state of the law.[3] Because the demurrer is no longer a conclusive admission (that is to say, because it merely assumes arguendo that the evidence presented is true) appellate reversal of an order sustaining a demurrer results in retrial. The question of whether full retrial might be avoided when the trial was nonjury received virtually no attention until the instant case, wherein the Supreme Court of Pennsylvania rejected the argument of the Commonwealth that resuming trial after reversal was the way to avoid the double jeopardy problem,

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[3]Pa. R. Crim. P. 1124(b) provides:

> A demurrer to the evidence shall not constitute an admission of any facts or inferences except for the purpose of deciding the demurrer. If the demurrer is not sustained, the defendant may present evidence and the case may proceed.

preferring to premise its decision on a waiver or election theory that would, if valid, permit full retrial whether the original trial was jury or nonjury.

That theory is, essentially, that a defendant who successfully challenges the legal sufficiency of the evidence at the close of the Commonwealth's case has "elect[ed] to seek dismissal on a basis unrelated to his factual guilt or innocence" (490 A. 2d at 401, Appendix to Petition for Writ of Certiorari at 26a-27a) and that appellate review of the discharge is accordingly permitted by United States v. Scott, 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978). The opinion below reads into the Scott reference to "factual guilt or innocence" (id. at 87, 98 S. Ct. at 2191, 57 L. Ed. 2d at 71; emphasis added) and the definition of an acquittal in United States v. Martin Linen Supply Company,

430 U.S. 564, 571, 97 S. Ct. 1349, 1355, 51 L. Ed. 2d 642, 651 (1977) as a "resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged" (emphasis added) an intent on the part of Your Honorable Court to distinguish between sufficiency determinations that consider credibility or weight of evidence and sufficiency determinations reached as a matter of law. The latter type of determination, supposedly, is "not on the merits." 490 A. 2d at 400, Appendix to Petition at 22a-23a. Petitioners believe that no such distinction was intended, and that the word "factual" was used in the cited cases to emphasize the difference between "rulings which relate to 'the ultimate question of guilt or innocence' and those which serve other purposes". Scott, note 11 at 98, 98 S. Ct. at 2197, 2198,

57 L. Ed. 2d at 79.

The attempt in the opinion below to extend the election theory of Scott to a challenge to the sufficiency of the evidence ignores the following language from that case:

> A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal. [Id. at 91, 98 S. Ct. at 2194, 57 L. Ed. 2d at 74; emphasis added.]
>
> [The case presents] a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt. [Id. at 96, 98 S. Ct. at 2196, 57 L. Ed. 2d at 77; emphasis added.]

The decision below is also at odds with Sanabria v. United States, 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43

(1978), where the suggestion that a sufficiency challenge is a waiver of double jeopardy rights was clearly rejected. In Sanabria Your Honorable Court stated:

> [T]his case does not present the...situation...of "'a defendant who is afforded an opportunity to obtain a determination of a legal defense prior to trial and nevertheless knowingly allows himself to be placed in jeopardy before raising the defense.'" [Citation omitted.]...[W]hat proof may be presented in support of a valid indictment and the sufficiency of that proof are not "legal defenses" required to be or even capable of being resolved before trial....[Id. at 77, 98 S. Ct. at 2185-86 57 L. Ed. 2d at 62; emphasis added.'
>
> To hold that a defendant gives his double jeopardy protection whenever a trial court error in his favor on a midtrial motion leads to an acquittal...would vitiate one of the fundamental rights established by the Fifth Amendment. [Id. at 78, 98 S. Ct. at 2186, 57 L. Ed. 2d at 62-63.]

Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) disposes of the contention that Pennsylvania's demurrer has a "special

nature" that distinguishes it from motions for judgment of acquittal under Federal Rule of Criminal Procedure 29. In Burks Your Honorable Court observed:

> [A] federal court's role in deciding whether a case should be considered by the jury is quite limited. Even the trial court, which has heard the testimony of witnesses first hand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal. [Citations omitted.] [Id. at 16, 98 S. Ct. at 2150, 57 L. Ed. 2d at 13.]

Moreover, the notion that there is a "pure question of law" exception to the Double Jeopardy Clause was implicitly rejected by the following comment in United States v. Wilson, 420 U.S. 351, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975):

> The Government has not seriously contended in this case that any ruling of law by a judge in the course of a trial is reviewable on the prosecution's motion...[Id. at 351, 95 S. Ct. at 1026, 43 L. Ed. 2d at 246.]

In Wilson it was held that appellate

review of postverdict dismissals does not offend the Double Jeopardy Clause because reversal results in reinstatement of the verdict rather than retrial. In Finch v. United States, 433 U.S. 676, 97 S. Ct. 2909, 53 L. Ed. 2d 1048 (1978), Your Honorable Court rejected an attempt to extend Wilson to allow an appeal from the dismissal of an information after a case was submitted to the court on stipulated facts was rejected; while the circuit court had taken the position that factual resolutions could be easily separated from determinations of law and that "the only determination to be made is a legal one[]", id. at 676-77, 97 S. Ct. at 2910, 53 L. Ed. 2d at 1050, it was held that the absence of a verdict that could be reinstated and the resulting necessity for further proceedings on the merits in the event of reversal precluded review notwithstanding the

characterization of the issue sought to be reviewed as one of law.

The opinion below apparently attaches some significance to petitioners' choice to make their sufficiency challenge at the close of the Commonwealth's case in the form of a demurrer rather than waiting until the close of all the evidence. Notes 5 and 6, 490 A. 2d at 400, 401, Appendix to Petition at 23a, 27a. However, as Your Honorable Court noted in Martin Linen, supra, the earliest stage of trial at which a Rule 29 motion may be made, the close of the government's case, "obviously arises well after jeopardy has attached." Id., note 8 at 571, 97 S. Ct. at 1354, 51 L. Ed. 2d at 650. The Martin Linen decision also pointed out that the label applied to a decision does not determine whether or not it is an acquittal, id. at 571, 97 S. Ct. at 1354-55, 51 L. Ed. 2d at

651, that judgments under Rule 29 are to be treated uniformly, and that judgments under 29(c) are as final as those under 29(a) and 29(b), id. at 575, 97 S. Ct. at 1356, 51 L. Ed. 2d at 653. It follows that judgments under Pennsylvania's procedures are to be treated uniformly whether or not they are labeled uniformly.

Martin Linen disposes of the claim that the manifest necessity doctrine permits review of the trial court's order:

> The normal policy granting the Government the right to retry a defendant after a mistrial that does not determine the outcome of a trial, [citation omitted], is not applicable since valid judgments of acquittal were entered on the express authority of, and strictly in compliance with, Rule 29(c). [Id. at 570, 97 S. Ct. at 1354, 57 L. Ed. 2d at 650.]

The Commonwealth argues that the nonjury trial may simply pick up where it left off and that this procedure would obviate any double jeopardy problem;

this contention likens the appellate process to a recess. The identical argument was made and rejected in United States v. Jenkins, 420 U.S. 358, 95 S. Ct. 1006, 43 L. Ed. 2d 250 (1975), wherein Your Honorable Court stated:

> [The Government's contentions] rest upon an aspect of the "continuing jeopardy" concept that...has never been adopted by a majority of this Court.... Here there was a judgment discharging the defendant, although we cannot say with assurance whether it was, or was not, a resolution of the factual issues against the Government. But it is enough for purposes of the Double Jeopardy Clause...that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand.... The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor. [Id. at 368-69, 370, 95 S. Ct. at 1013, 43 L. Ed. 2d at 258-59; emphasis added.]

While Scott modified Jenkins insofar as it applied to terminations at the instance of the defendant on grounds unrelated to guilt or innocence, the

Scott decision made clear that Your Honorable Court's rejection of the theory that jeopardy might continue after an acquittal still stood. Id., note 6 at 90, 98 S. Ct. at 2193, 57 L. Ed. 2d at 73. The conclusion that further proceedings on the issue of guilt, in whatever form, after an acquittal, are as offensive to the Double Jeopardy Clause as full retrial was reaffirmed in Swisher v. Brady, 438 U.S. 204, 218, 98 S. Ct. 2699, 2708, 57 L. Ed. 2d 705, 717 (1978). In Justices of Boston Municipal Court v. Lydon, ___ U.S. ___, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984), the concept of "continuing jeopardy" was, for the first time, embraced by a majority of Your Honorable Court, but the decision made clear that an acquittal still terminates jeopardy. Id. at ___, 104 S. Ct. at 1814, 80 L. Ed. 2d at 325.

In United States v. Jaramillo, 510

F. 2d 808 (8th Cir. 1975), the court was presented with the same contention that was unsuccessfully advanced by the prosecution in Jenkins, and responded as follows:

> [Resumption of the nonjury trial] would subject the appellees to the same hazards incurred in a second trial that are clearly prohibited by the double jeopardy clause. The remand would provide the government with another chance to convict the appellees by exhaustively reviewing the record, marshaling the facts and rearguing the case in a manner not previously presented. The appellees would be put to further expense, ordeal and anxiety. [Id. at 812.]

The court pointed out that the proposed procedure would, additionally, impair other interests of the defendant and of the criminal justice system:

> Even if the same trial judge were available on remand, there is nothing to assure that the passage of time and the resultant dimming of the memory will not adversely affect the rights of the appellees. Finally, a rule that would permit a new trial in every judge-tried criminal case where the trial court specifically applied an erroneous

> rule of law in deciding to acquit, would discourage the court trial of criminal cases. Such a rule would permit court-acquitted defendants to be tried a second time while sparing jury-acquitted defendants from the same ordeal...[Id. at 812-13.]

With respect to any lingering issue of ripeness, petitioners rely on Cox Broadcasting Company v. Cohn, 420 U.S. 469, 482-84, 95 S. Ct. 1029, 1040, 43 L. Ed. 2d 328, 342-43 (1975), and Burks, note 6 at 437 U.S. 11, 98 S. Ct. at 2147, 57 L. Ed. 2d at 9, and submit that while further appellate proceedings in state court would not, strictly speaking, constitute resumption of jeopardy, federal policy would be undermined by postponing intervention until the merits of the acquittal have been reviewed, particularly since the petitioners have borne the burden of three rounds of state court appeals in the five years that have elapsed since they were acquitted.

The conclusion is inescapable that

the Pennsylvania rule permitting the Commonwealth to appeal orders sustaining demurrers is an anachronism that cannot be reconciled with the Double Jeopardy Clause; the Clause recognizes no distinction between a not guilty verdict and a judicial determination that not guilty is the only possible verdict. The Superior Court of Pennsylvania correctly quashed the appeals, and its order should be reinstated.

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be vacated, and the order of the Superior Court of Pennsylvania quashing the appeals of the Commonwealth from the orders discharging petitioners should be reinstated.

Respectfully submitted,

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Thomas A. Livingston, Esquire
Attorney for Petitioner Ernest Smalis

RESPONDENT'S

BRIEF

No. 85-227

IN THE

Supreme Court of the United States

DESPINA and ERNEST SMALIS,

Petitioners,

—vs.—

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether state criminal practice may, consistent with the Double Jeopardy Clause, limit the authority of a trial court to rule, at the close of the prosecution's case, on the sufficiency of the evidence to support a criminal charge to a determination of law which would be reviewable by an appellate court?

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OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania, sub nom. Commonwealth v. Zoller, is reported at 507 Pa. 344, 490 A.2d 394 (1985). The en banc Opinion of the Superior Court of Pennsylvania is reported at Commonwealth v. Smalis at 331 Pa. Super. 307, 480 A.2d 1046 (1984).

CONSTITUTIONAL PROVISIONS AND RULES OF COURT INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States provides:

> ... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

Pa. R. Crim. P., Rule 1124, 42 Pa. C.S. provides:

> RULE 1124. CHALLENGES TO SUFFICIENCY OF EVIDENCE.
>
> (a) A defendant may challenge the sufficiency of the evidence to

sustain a conviction of one or more of the offenses charged by a:

(1) demurrer to the evidence presented by the Commonwealth at the close of the Commonwealth's case-in-chief;

(2) motion for judgment of acquittal at the close of all the evidence;

(3) motion for judgment of acquittal filed within ten (10) days after the jury has been discharged without agreeing upon a verdict; or

(4) motion in arrest of judgment filed within ten (10) days after a finding of guilt.

(b) A demurrer to the evidence shall not constitute an admission of any facts or inferences except for the purpose of deciding the demurrer. If the demurrer is not sustained, the defendant may present evidence and the case shall proceed.

(c) If a defendant moves for judgment of acquittal at the close of all the evidence, the court may reserve decision until after the jury returns a guilty verdict or after the jury is discharged without agreeing upon a verdict.

(d) The defendant may file a motion under subparagraphs (a)(3) or (a)(4) even though the defendant did not move for judgment of acquittal at the close of all the evidence. The denial of a motion for judgment of acquittal at the close of all the evidence does not preclude later consideration of a motion for judgment of acquittal after discharge of the jury or a motion in arrest of judgment.

Fed. R. Crim. P. 29 provides:

Rule 29. Motion for Judgment of Acquittal.

(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

STATEMENT OF THE CASE

Based upon a presentment of an intestigating grand jury, Ernest and

Despina Smalis, husband and wife, were each charged with Criminal Homicide (two counts), Recklessly Endangering Another Person (two counts), Causing Catastrophe, and Failure to Prevent Catastrophe. Despina Smalis was also charged with Securing Execution of Documents by Deception. The charges arose out of the deaths of two people, and danger to two others, caused by a fire that occurred on February 12, 1979, in a building owned by petitioners, located in the Oakland section of the City of Pittsburgh, which contained a bar-restaurant and seven dwelling units and named the "Chances R." These charges were consolidated for trial with charges arising out of another, earlier fire in another building owned by petitioners, called the Moonraker Lounge.

Trial without a jury began on November 10, 1980, in the Court of Common Pleas of Allegheny County, Pennsylvania. At the close of the Commonwealth's case on December 19, 1980, the trial court sustained both defense attorneys' demurrers with respect to the charges of Murder, Voluntary Manslaughter, and Causing Catastrophe as to both petitioners. Demurrers were denied as to the remaining charges.

An appeal to the Pennsylvania Superior Court was then filed from the Orders sustaining the demurrers. Reconsideration of the Orders was also sought. The trial court granted reconsideration but reaffirmed its original Orders on January 8, 1981. The Commonwealth then appealed from the reaffirmance of the Orders. The trial court, by Order entered January 9, 1981, granted a Commonwealth

motion to stay further proceedings on the remaining "Chances R" charges pending disposition of the appeals. Trial continued on the charges based on the Moonraker fire.

A Motion to Quash Appeal was filed in the Superior Court contending that appellate review was barred by the Double Jeopardy Clause. On May 11, 1981, the Superior Court denied that motion without prejudice to raise the issue of appealability in the brief on the merits.

On July 8, 1983, a panel of the Superior Court quashed the appeals on double jeopardy grounds. The Commonwealth successfully sought reargument before the Superior Court of Pennsylvania, sitting en banc, which, with one judge dissenting, on June 29, 1984, entered an Order quashing the Commonwealth's appeal.

The Supreme Court of Pennsylvania granted the Commonwealth's request for review and consolidated the case with Commonwealth v. Zoller, wherein the Superior Court had rendered a decision (reported at 318 Pa. Super. 402, 465 A.2d 16) quashing a similar appeal on the basis of the panel decision in the instant case. After briefing and argument, the Pennsylvania Supreme Court, on March 29, 1985, reversed the Superior Court decisions quashing the appeals, remanded the instant case to the Superior Court for consideration of the merits of the appeals, and remanded the Zoller case to the trial court for a new trial, the Superior Court having earlier found that the Order sustaining the demurrer in that case was erroneously entered. Petitioners filed an Application for Reargument, which the Pennsylvania Supreme Court denied on June 11, 1985.

Petitioners filed a Petition for Writ of Certiorari to this Honorable Court, which was granted on November 4, 1985.

INTRODUCTION

"This case presents a serious question concerning the meaning and application of that provision of the Fifth Amendment to the Constitution which declares that no person shall 'be subject for the same offence [sic] to be twice put in jeopardy of life or limb.'" Green v. United States, 355 U.S. 184, 185 (1957).

This Court has characterized the language of the Double Jeopardy Clause as "deceptively plain," giving rise to problems that are "both subtle and complex."[1] The Court has further commented that its own decisions "can hardly be characterized as models of consistency and clarity."[2]

Professing no clearer vision of the meaning and application of this principle than this Court, Pennsylvania nevertheless finds that the decisions of this Court and the integrity of the Double Jeopardy Clause are not offended by the decision of the Pennsylvania Supreme Court which upheld the right of the prosecution to appeal the grant of a demurrer.[3]

However, Pennsylvania does profess a clearer understanding of those decisions and the Double Jeopardy Clause than petitioners Smalis and

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FOOTNOTE 1, FROM PAGE 9.

Crist v. Bretz, 437 U.S. 27, 33 (1978).

FOOTNOTE 2, FROM PAGE 9.

Burks v. United States, 437 U.S. 1, 10 (1978).

3 Prior Pennsylvania practice regarding demurrers at common law and under prior statutes has been codified without alteration by adoption of Pa. R. Crim. P. 1124.

amicus curiae. Petitioners urge a proposition of law upon this Court that contradicts a valid and long-standing state procedure. They can find no support in the law of Pennsylvania for their anomalous proposition, nor can they find any support of substance in like jurisprudence of this Court once that body of law is precisely read and comprehensively appreciated.

With that, Pennsylvania respectfully begins.

SUMMARY OF THE ARGUMENT

Pennsylvania criminal practice affords a defendant the opportunity to challenge the evidentiary sufficiency of the prosecution's case at various junctures. A "demurrer" is included in that statutory scheme as Pa. R. Crim. P. 1124(a)(1) and allows the defendant to raise, as a pure question

of law, a challenge to the sufficiency of the evidence at the close of the prosecution's case. It is indisputable that, under established Pennsylvania practice, the operative concept of a demurrer does not contemplate the resolution of any factual matters; in fact, such a consideration is absolutely prohibited. Consequently, there is no application of the concept of acquittal, either express or implied, at the time a demurrer is considered and ruled upon in Pennsylvania practice.

Comparisons of Pa. R. Crim. P. 1124 to Fed. R. Crim. P. 29 are misplaced insofar as the federal rule chooses to express very broadly what Pennsylvania has chosen to narrowly define. Consequently, while the federal rule contemplates and explicitly states that an acquittal is to follow a finding of evidentiary insufficiency

at various procedural junctures, Pennsylvania does not delimit the notion of acquittal but rather reserves it for an appropriate and specified procedural juncture.

While this Court has jealously guarded and zealously enforced the principle that an accused, once acquitted, in express or implied terms, shall not be tried again, it has nonetheless remained steadfast in insisting that the interests of justice demand that the prosecution be given one fair opportunity to convict. Presented to the Court herein is the prosecution attempting to pursue on appeal a midtrial error of law by the trial judge pursuant to a valid and fair Pennsylvania practice -- a practice entirely consistent and supported by this Court's enlightened jurisprudence.

ARGUMENT

APPELLATE REVIEW OF THE MIDTRIAL DETERMINATION BY A TRIAL JUDGE ENTERED PURSUANT TO LIMITED AUTHORITY TO RULE UPON A QUESTION OF LAW RAISED BY A DEFENDANT IN A PRECISELY DEFINED MOTION IS NOT PRECLUDED BY THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

Pa. R. Crim. P. 1124 is a procedural mechanism that provides an accused a precise and fair opportunity to challenge the evidentiary sufficiency of the prosecution's case during the course of the trial and thereafter.[4]

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4 Pa. R. Crim. P. 1124, provides as follows:

Rule 1124. Challenges to Sufficiency of Evidence

(a) A defendant may challenge the sufficiency of the evidence to sustain a conviction of one or more of the offenses charged by a:

(1) demurrer to the evidence presented by the Commonwealth at the close of the Commonwealth's case-in-chief;

FOOTNOTE 4 CONTINUED ON PAGE 15.

Succinctly stated, petitioners' assault on Pennsylvania practice as embodied in Pa. R. Crim. P. 1124(a)(1) occurs on two fronts: (1) a comparison of the Pennsylvania rule to Fed. R.

FOOTNOTE 4, CONTINUED FROM PAGE 14.

(2) motion for judgment of acquittal at the close of all the evidence;

(3) motion for judgment of acquittal filed within ten (10) days after the jury has been discharged without agreeing upon a verdict; or

(4) motion in arrest of judgment filed within ten (10) days after a finding of guilt.

(b) A demurrer to the evidence shall not constitute an admission of any facts or inferences except for the purpose of deciding the demurrer. If the demurrer is not sustained, the defendant may present evidence and the case shall proceed.

(c) If a defendant moves for judgment of acquittal at the close of all the evidence, the court may reserve decision until after the jury returns a guilty verdict or after the jury is discharged without agreeing upon a verdict.

FOOTNOTE 4 CONTINUED ON PAGE 16.

Crim. P. 29(a) and case law decided thereto; and (2) application of more encompassing decisions of this Court concerning the Double Jeopardy Clause of the Fifth Amendment and the concept of acquittal discussed herein.

Pennsylvania now states, and hereinbelow demonstrates, that a close reading and accurate analysis of the rules of procedure involved and this Court's jurisprudence foreclose the interpretation and consequence that the petitioners urge upon this Court.

FOOTNOTE 4, CONTINUED FROM PAGE 15.

> (d) The defendant may file a motion under sub-paragraphs (a)(3) or (a)(4) even though the defendant did not move for judgment of acquittal at the close of all the evidence. The denial of a motion for judgment of acquittal at the close of all the evidence does not preclude later consideration of a motion for judgment of acquittal after discharge of the jury or a motion in arrest of judgment.
>
> Pa. R. Crim. P. 1124.

Pennsylvania immediately takes issue with comparisons which purport to be dispositive of the present dispute made by petitioner Smalis and amicus curiae comparing Pa. R. Crim. P. 1124(a)(1), to Fed. R. Crim. P. 29 (a).[5] Fed. R. Crim. P. 29(a) provides that a defendant may move for a

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5 Fed. R. Crim. P. 29 provides in full:

Motion for Judgment of Acquittal.

> (a) Motion before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

FOOTNOTE 5 CONTINUED ON PAGE 18.

judgment of acquittal at the close of the government's case, or he may wait for the close of all of the evidence and again, or perhaps for the first time, request an acquittal. Although

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FOOTNOTE 5, CONTINUED FROM PAGE 17.

> (b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.
>
> (c) Motion after Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

Fed. R. Crim. P. 29.

of the same broad purpose, Pennsylvania maintains that, considered in its entirety, the procedure described in the Pennsylvania rule presents a unique procedural scheme, distinct from its federal counterpart, that is of sufficient constitutional integrity to be eminently defensible under the Fifth Amendment. Benton v. Maryland, 395 U.S. 784 (1969).

Accurate comparison of the Pennsylvania law and its federal counterpart reveals that Fed. R. Crim. P. 29 (a) collects or merges into one section, entitled "Motion for Judgment of Acquittal," what Pennsylvania takes pains to separate into two distinct sections, namely Pa. R. Crim. P. 1124 (a)(1), defining a "demurrer," and Pa. R. Crim. P. 1124(a)(2), defining an "acquittal." See, Serfass v. United States, 420 U.S. 377, 383 (1975)("But

the language of cases in which we have held that there can be no appeal from, or further prosecution after, an 'acquittal' cannot be divorced from the procedural context in which the action so characterized was taken. The word itself has no talismanic quality for purposes of the Double Jeopardy Clause.")(citing United States v. Wilson, 420 U.S. 332, 346 (1975))).

While Fed. R. Crim. P. 29(a) envelops two procedural junctures -- a defense challenge at the close of the prosecution's case and a later defense challenge at the close of all the evidence, under one section denominated "Motion before Submission to Jury" -- Pennsylvania chooses, as appropriate to its judicial system, to more precisely and narrowly define the challenges available, and the consequent impact of each. While this Court may

or may not choose to further discuss the application of double jeopardy principles to the federal rule, see United States v. Martin Linen Supply Company, 430 U.S. 564 (1977), such a discussion is not necessary to resolve the issue presently before this Court in regard to Pa. R. Crim. P. 1124.[6] However the precise issue to be determined here is the vitality, under double jeopardy principles, of the current Pennsylvania scheme of practice existing as set forth in Pa. R. Crim. P. 1124 which permits an accused to challenge, as a matter of law in the specified form of a "demurrer," the sufficiency of the prosecution's

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6 In any event, an accurate discussion of Rule 29 is of benefit to Pennsylvania. See, Brief for the Solicitor General of the United States of America, Amicus Curiae in the case at bar.

evidence at the close of the prosecution's case. Compare, Crist v. Bretz, 437 U.S. 27, 38-39 (1978)(where the federal rule regarding the attachment of jeopardy in a jury trial is also a settled part of constitutional law, viz. the guarantee against double jeopardy, Montana's rule which differs from the federal rule cannot constitutionally be applied).

First it is Pennsylvania's contention that this Court's scrutiny of Pa. R. Crim. P. 1124(a)(1) within the structure of Pennsylvania criminal procedure will reveal an independent basis to uphold the present scheme and the decision of the Pennsylvania Supreme Court.[7]

The Pennsylvania rule and jurisprudence surrounding it contemplate,

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FOOTNOTE 7 CAN BE FOUND ON PAGE 23.

by that very structure and interpretation, that a demurrer pursuant to Pa. R. Crim. P. 1124(a)(1) is distinct from an acquittal entered pursuant to Pa. R. Crim. P. 1124(a)(2). The difference lies not only in timing but in effect.[8] The Pennsylvania Supreme Court recognized and expressed as much when, after reviewing the general, and Pennsylvania history, of a demurrer for purposes of the present case, it stated, "We conclude, therefore, that a demurrer is not the functional

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FOOTNOTE 7, FROM PAGE 22.

Compare, Hudson v. Louisiana, 450 U.S. 40, 42-43, n. 1 (1981)(retrial is barred after trial judge granted defendant's Motion for New Trial based on insufficient evidence where Louisiana Code of Criminal Procedure did not authorize trial judges to enter judgments of acquittal in jury trials, and a defendant's only means of challenging the sufficiency of the evidence presented against him to a jury was a Motion for a New Trial following rendition of the verdict).

FOOTNOTE 8 CAN BE FOUND ON PAGE 24.

equivalent of an acquittal, and that the Commonwealth has the right to appeal from an order sustaining defendant's demurrer to its case-in-chief." Commonwealth v. Zoller, 507 Pa. 344,

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FOOTNOTE 8, FROM PAGE 23.

Insofar as it is considered that petitioners could have waited until the close of their case or merely rested and moved for an acquittal under Pa. R. Crim. P. 1124(a)(2), Pennsylvania submits that the Smalises cannot now delimit the circumscription of Rule 1124(a)(1) by such belated rationale since this Court has flatly stated that, "Legal consequences ordinarily flow from what actually happened, not from what a party might have done from the vantage of hindsight." Sanabria v. United States, 437 U.S. 54, 66, citing Central Tablet Manfacturing Company v. United States, 417 U.S. 673, 690 (1974) (footnote omitted).

That view, coupled with the Court's statement that "While form is not to be exalted over substance in determining the double jeopardy consequences of a ruling terminating a prosecution, neither is it appropriate entirely to ignore the form of the order entered by the trial court," Sanabria, 437 U.S. at 67, indicates that this Court's consideration of the present issue must place heavy emphasis on Pennsylvania's statutory scheme specifying the demurrer as a unique procedural juncture with a singular and reviewable effect.

490 A.2d 394, 400 (1985)(emphasis added)(citing and discussing Commonwealth v. Wimberly, 488 Pa. 169, 411 A.2d 1193 (1979); Commonwealth v. Long, 467 Pa. 98, 354 A.2d 569 (1976); Commonwealth v. Mitchell, 460 Pa. 665, 334 A.2d 285 (1975); Commonwealth v. Carroll, 443 Pa. 518, 278 A.2d 898 (1971); Commonwealth v. Haines, 410 Pa. 601, 190 A.2d 118 (1963); Commonwealth v. DePetro, 350 Pa. 567, 39 A.2d 838 (1944); Commonwealth v. Parrish, 250 Pa. Super. 176, 378 A.2d 884 (1977); Commonwealth v. Kelly, 237 Pa. Super. 468, 352 A.2d 127 (1975); Commonwealth v. Kerr, 150 Pa. Super. 598, 29 A.2d 340 (1942); Commonwealth v. Simpson, 310 Pa. 380, 165 A. 498 (1933); Commonwealth v. Williams, 71 Pa. Super. 311 (1919)).

The Pennsylvania Supreme Court thus limited its ruling to a demurrer

granted pursuant to Pa. R. Crim. P. 1124(a)(1) and did not, and properly so, extend its ruling or rationale to an order of acquittal which may be entered at the close of all the evidence pursuant to Pa. R. Crim. P. 1124(a)(2). Zoller, 507 Pa. at 358, 490 A.2d at 400-01, n. 5, 6, 7. See also, Commonwealth v. Smalis, 331 Pa. Super. 307, 480 A.2d 1046, 1052-55 (1984)(Johnson, J., dissenting).

The fact that the federal rule may obliterate, or conceal, the distinction that is strongly emphasized by Pennsylvania should not by consequence or effect eviscerate valid Pennsylvania procedure and the law pertaining thereto. See, Arizona v. Maypenny, 451 U.S. 232, 249, rehg. den. 452 U.S. 955 (1981). In Maypenny, an analogous situation from which this Court may find guidance,

this Court considered an Arizona procedure[9] that authorized the prosecution to seek review when it claims that the lower court has exceeded its jurisdiction or abused its discretion, e.g., in Maypenny the prosecution sought review of a judgment of acquittal following a guilty verdict. Maypenny, 451 U.S. 240-41. In Arizona, similar to Pennsylvania practice and experience heretofore in regard to demurrer, see, Zoller, 507 Pa. at 357-58, 490 A.2d at 400-01, the state's petition for review pursuant to the Arizona statute was routinely granted.

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9 Ariz. Rev. Stat. Ann. §12-2001 (1956) reads:

> The writ of certiorari may be granted by the supreme and superior courts or by any judge thereof, in all cases when an inferior tribunal, board or officer, exercising judicial functions, has exceeded its jurisdiction and there is no appeal, nor, in the judgment of the court, a plain, speedy and adequate remedy.

Maypenny, 451 U.S. at 240-41. In Maypenny, this Court discussed the general cautions and concerns that surround the federal government's right to appeal an adverse criminal judgment. Maypenny, 451 U.S. at 246-48. However, Justice Blackmun there commented on the deference given valid state law: "'[i]t goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government.' Patterson v. New York, 432 U.S. 197, 201, 97 S.Ct. 2319, 2322, 53 L.Ed.2d 281 (1977). Because the regulation of crime is pre-eminently a matter for the States, we have identified 'a strong judicial policy against federal interference with state criminal proceedings.' Huffman v. Purdue, Ltd., 420 U.S. 592, 600, 95 S.Ct. 1200,

1206, 43 L.Ed.2d 482 (1975). ..." Maypenny, 451 U.S. at 244.

Pennsylvania respectfully requests similar deference be granted its law here: "If a State wishes to empower its prosecutors to pursue a criminal appeal under certain circumstances, it is free to so provide, limited only by the guarantees afforded the criminal defendant under the Constitution." Maypenny, 451 U.S. at 250; see also, Illinois v. Somerville, 410 U.S. 458, 469 (1973)("Federal courts should not be quick to conclude that simply because a state procedure does not conform to the corresponding federal statute or rule, it does not serve a legitimate state policy. Last Term, recognizing this fact, we dismissed a writ of certiorari as improvidently granted in a case involving a claim of double jeopardy stemming from

the dismissal of an indictment under the 'rules of criminal pleading peculiar to' an individual state followed by a retrial under a proper indictment").

In comparison to its view regarding the situation of a demurrer under Pa. R. Crim. P. 1124(a)(1), Pennsylvania accepts the full application and the full impact of double jeopardy jurisprudence, including United States v. Martin Linen Supply Company, 430 U.S. 564 (1977) to the circumstances of Pa. R. Crim. P. 1124(a)(2), where an acquittal is explicitly contemplated and an accused is given the opportunity to secure it on proper motion.

Conversely, a demurrer to the prosecution's evidence is predicated upon a review of the quantum of evidence presented by the prosecution, while an acquittal is predicated upon

an evaluation of the quality of evidence and represents a resolution of factual issues. A trial court's determination, viz. a demurrer, must therefore be based upon the evidence presented by the Commonwealth and all inferences which flow naturally from that evidence without the necessity of any factual findings and credibility determinations. Thus, the legal decision made by a trial judge in sustaining a defendant's motion for a demurrer is no different in nature from other rulings of law which are appealable by the prosecution. See, e.g., Commonwealth v. Bosurgi, 411 Pa. 56, 190 A.2d 304 (1963)(Commonwealth may appeal from order suppressing evidence where suppression order substantially handicaps or effectively terminates prosecution); Commonwealth v. White, 482 Pa. 197, 393 A.2d 447 (1978)

(Commonwealth may appeal an order granting a motion for new trial where question involved is one of law); Commonwealth v. Blevins, 453 Pa. 481, 309 A.2d 421 (1973), appeal after remand 459 Pa. 652, 331 A.2d 180 (1975)(Commonwealth may appeal order of lower court sustaining defendant's motion in arrest of judgment on basis that issue of whether testimony offered at trial by Commonwealth was insufficient to support jury's finding of Second Degree Murder constitutes pure issue of law).

The concept of demurrer embodied in Pa. R. Crim. P. 1124(a)(1) contemplates a ruling upon an issue of law exclusively, reserving the concept of acquittal for a later and more appropriate time in Pennsylvania procedure.

This is not merely a matter of timing that can be described as

arbitrary, see, e.g., Martin Linen, 430 U.S. at 575. Rather, it is a matter of valid state criminal procedure, of which the defendant is on notice, that fairly provides an accused the opportunity to challenge the sufficiency of the evidence at two points prior to verdict -- the first, a demurrer under Pa. R. Crim. P. 1124 (a)(1), restricted to a ruling of law entered purely on the basis of admitted facts as they may or may not establish the elements of the charged crimes, and the second, under Pa. R. Crim. P. 1124(a)(2), where a defendant demands and may receive an outright acquittal.

The distinction apparent in the structure of Pa. R. Crim. P. 1124 is one that is also well established in the general history of the law and Pennsylvania practice in particular. Briefly but accurately stated, a

demurrer to the evidence is a common law practice with roots deeply imbedded in early English and American law. Blackstone, in his Commentaries on the Common Law, characterizes the demurrer as an "issue as to law," as distinguished from an "issue of fact."

> An issue upon matter of law is called a demurrer; and it confesses the facts to be true, as stated by the opposite party; ... As, if the matter of the plaintiff's complaint or declaration be insufficient in law, ... then the defendant demurs to the declaration. ...

Cooley's Blackstone at 1091 (4th Ed.) (Compare, "An issue of fact is where the fact only, and not the law, is disputed. ... And this issue of fact must, generally speaking, be determined, not by the judges of the court, but by some other method; the principal of which methods is that by the country, per pais, that is, by jury." Id. at 1092). See also, United States

v. Wilson, 420 U.S. 332, 340-43 (1975).

The common law demurrer described by Blackstone is in all material respects identical in nature to the demurrer currently part of Pennsylvania criminal procedure.[10]

The essential nature of a demurrer to the evidence was set out in an early decision of the Pennsylvania

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10 The right of a criminal defendant to demur to the Commonwealth's evidence was statutorily granted for approximately forty-five (45) years. 19 P.S. §481, Act of June 5, 1937, P.L. 1703, No. 357, §1. This statute was repealed by the Judiciary Act Repealer Act, 42 Pa. C.S. §20002(a), Act of April 28, 1978, P.L. 202, No. 53, §2; as affected by the Act of December 20, 1982, P.L. 1409, No. 326, Art. IV, §317. Despite the repeal of this section, the demurrer was preserved as part of the common law. 42 Pa. C.S. §20003(b). On January 28, 1983, the Supreme Court of Pennsylvania adopted Pa. R. Crim. P. 1124, effective July 1, 1983, which currently governs the defendant's right to move for a demurrer to the evidence. It is conceded that it codifies prior practice without alteration. Brief for Petitioners at 10, n. 2.

Superior Court in the case of Commonwealth v. Williams, 71 Pa. Super. 311 (1919):

> In criminal cases demurrer to the evidence of the Commonwealth admits all the facts which the evidence tends to prove, and all inferences reasonably deducible therefrom: Commonwealth v. Parr, 5 W&S 345; Golden v. Knowles, 120 Mass. 136; Wharton's Crim. Ev. Sec. 616; McKowen v. McDonald, 43 Pa. 441. The court in such case is not the trier of facts. The admissions implied in the demurrer leave for consideration the single inquiry whether the evidence introduced presents such a state of facts, with the inferences fairly arising therefrom, as would support a verdict of guilty.

Id. at 313 (emphasis added). As stated in a subsequent Pennsylvania Superior Court decision, "[t]he object of a demurrer to the evidence is to ascertain the law on an admitted state of facts." Commonwealth v. Kerr, 150 Pa. Super. 598, 601, 29 A.2d 340, 342 (1942). Thus, the trial judge may not

pass upon the credibility of Commonwealth witnesses at the demurrer stage of the proceedings, Commonwealth v. Wimberly, 488 Pa. 169, 411 A.2d 1193 (1979), rearg. den. March 25, 1980, nor may he engage in weighing the Commonwealth's evidence. Commonwealth v. Kelly, 237 Pa. Super. 468, 352 A.2d 127 (1975), allocatur den. February 23, 1976. Thus, the question before the trial judge in ruling on a demurrer remains purely one of law. Commonwealth v. Wimberly, 488 Pa. at 172, 411 A.2d at 1194; Commonwealth v. Haines, 410 Pa. 601, 190 A.2d 118 (1963); Commonwealth v. Frank, 159 Pa. Super. 271, 48 A.2d 10 (1946).

Because a demurrer represents a purely legal determination, it is necessarily distinct from an acquittal, which represents a determination of fact. There is no reason to conclude

that a court in ruling on a demurrer necessarily resolves questions of fact. The standard of review of the evidence that applies in ruling on a demurrer works to hypothesize the constructive "facts" for the purpose of determining the legal issue presented in terms of the existence of a prima facie case for the charged offense. A contrary view can only be advanced without regard to the existence and operation of the standard of review. Nor is it accurate to characterize one of the functions of the jury in reaching its verdict as evaluating the existence of a prima facie case. In this fashion amicus curiae argue that because a jury engages in the same sort of consideration of the sufficiency of evidence in its deliberations, a ruling on a demurrer is also a question of fact. Needless to say,

it is a fallacy to consider acccording to its instuctions that a jury does anything of the sort in performing its function. The evolution of the demurrer and the rationale for its development recognizes that this is peculiarly a judicial function to insure the existence of a valid basis for the return of a fair verdict on the issues of fact and is no concern of the jury. Yet the contrary view is dependent on just this sort of tautology. It arose under Fed. R. Crim. P. 29(c). The construction of the rule, which is notable for intertwining the concepts of directed verdict and demurrer that have traditionally been separated in Pennsylvania practice (and indeed its very title), are compelling inducements for the occurrence of the "de facto acquittal." To consider the Martin Linen holding in broader,

sweeping terms without fair regard for its unique factual predicate or the point that it arose in the context of such a procedural rule is conveniently myopic and without sound justification. It can only be fairly understood in that context. Petitioner's reliance on Martin Linen is largely built on this paradoxical interpretation. "[A] defendant is acquitted only when 'the ruling of the judge [or finding of the jury], whatever its label, actually represents a resolution [in the defendant's favor] correct or not, of some or all of the factual elements of the offense charged.'" United States v. Scott, 437 U.S. 82, 92 (1978), rehg. den. October 2, 1978, citing Martin Linen, 430 U.S. 564, 571 (1972)(emphasis added). Clearly, therefore, once an acquittal, i.e., a resolution of some or

all of the factual elements, has been entered in favor of the defendant, it cannot be reviewed, on error or otherwise, without placing the defendant twice in jeopardy in violation of the Fifth and Fourteenth Amendments. United States v. Ball, 163 U.S. 662 (1896); Benton v. Maryland, 395 U.S. 784 (1969). However, under Pennsylvania practice, an accused who avails himself of Pa. R. Crim. P. 1124 (a)(1) does not face a fact finder since no factual resolution has as yet occurred, nor is any encompassed by a ruling under its terms; thus, the impact of the Double Jeopardy Clause is as yet reserved:

> Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier 'having jurisdiction to try the question of guilt or innocence of the accused.' Kepner v. United States, 195 U.S. at 133, 24

> S.Ct. at 806. See, Price v. Georgia, 398 U.S. at 329, 90 S.Ct. at 1761. Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy.

Serfass v. United States, 420 U.S. 377, 392-93 (1975). Pennsylvania also contends that this Court has interpreted the seminal and oft-cited case in this area, Ball v. United States, 140 U.S. 118 (1891) in a manner entirely consistent with, and supportive of, the position maintained by Pennsylvania herein. In Illinois v. Somerville, 410 U.S. 458, 468 (1973), the Court commented on the decision in Ball as follows:

> But the Court was obviously and properly influenced by the fact that the first trial had proceeded to verdict. This focus of the Court is reflected in the opinion:

> '[W]e are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing.
>
> ... [T]he accused, whether convicted or acquitted, is equally put in jeopardy at the first trial. ...

Somerville, 410 U.S. at 468 (quoting Ball, 163 U.S. at 669; emphasis added in Somerville).

Should a trial judge in Pennsylvania, when deciding to grant a demurrer, actually rule on some of the factual elements of the offense charged rather than deciding the issue as purely one of law, appellate courts will treat the ruling as a de facto judgment of acquittal and bar any appeal due to double jeopardy considerations. See, Commonwealth v. Wimberly, 488 Pa. at 172, 173, 411 A.2d at 1194,

1195 (The trial court, in sustaining a demurrer, stated that "This Court, as a fact-finder, rejects as not being credible or worthy of belief that portion of the testimony which contradicted the statement of the defendant." The Pennsylvania Supreme Court, in refusing to allow the Commonwealth to appeal the lower court's granting of the demurrer, stated: "The trial court in the instant case, while characterizing its action as the granting of a demurrer, actually entered a de facto judgment of acquittal.... Accordingly the Commonwealth's appeal in the instant case must be dismissed").

This Court has recognized the ability of courts to make the type of distinctions required in deciding whether a demurrer has been properly granted and hence appealable, or whether the trial court actually entered

a de facto acquittal: "[T]his Court has had no difficulty in distinguishing between those rulings which relate to 'the ultimate questions of guilt or innocence' and those which serve other purposes. ... We reject the contrary implication of the dissent that this Court or other courts are incapable of distinguishing between the latter and the former." Scott, 437 U.S. at 98, n. 11 (citations omitted).

Given an opportunity to run its full course, Pennsylvania procedure fully comports with the Double Jeopardy Clause. One of two things may happen upon appellate consideration of the prosecution's appeal of the trial court order granting a demurrer pursuant to Pa. R. Crim. P. 1124(a)(1). The first is that the reviewing court, upon examination of the record and statutory law applicable thereto, may

agree with the trial court that the evidence is insufficient to convict. Thus, with the benefit of the enlightened perception of an appellate court, the determination that the proper result has obtained in the court below is verified and the defendant is unconditionally discharged. This is the rule of Burks, and it is thus honored under Pennsylvania practice.

Here the Smalises requested and received a ruling of law from a Pennsylvania trial court in a proceeding that is otherwise unremarkable.[11] The prosecution is merely attempting to secure an accurate interpretation of the state penal criminal statutes

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11 The understood nature of the trial court's ruling is in some measures reflected in the petitioners' own requests that the trial court review its ruling via requests for reconsideration.

involved as they apply to the facts of the case.[12]

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12 "While form is not to be exalted over substance in determining the double jeopardy consequences of a ruling terminating a prosecution, neither is it appropriate entirely to ignore the form of the order entered by the trial court." Sanabria, 437 U.S. at 67, citing inter alia, Serfass v. United States, 420 U.S. at 377, United States v. Jorn, 400 U.S. 470, 478, n. 7 (1971). See, Sanabria v. United States, 437 U.S. 54, 67 (1978).

Generally speaking, the substance, as it appears from all indications of record, rather than the "label" given to a particular ruling controls for double jeopardy purposes. It is respectfully submitted that, for purposes of determining the application of the prohibition against double jeopardy, "labels" are nevertheless accorded somewhat differential treatment. Undoubtedly a directed verdict by any other name would still bar retrial. That is, the function of the ruling is determinative. This is a reasonable implication of this Honorable Court's holding in Martin Linen. If, however, a ruling, regardless of its substance, is inaptly expressed in terms of a verdict of "not guilty," or an acquittal as a matter of the facts, retrial is also barred. Commonwealth v. Haines, 410 Pa. 601, 190 A.2d 118 (1963); Commonwealth v. Kerr, 150 Pa. Super. 598, 29 A.2d 340 (1942).

FOOTNOTE 12 CONTINUED ON PAGE 48.

The second is that the appellate court may determine that there exists,

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FOOTNOTE 12, CONTINUED FROM PAGE 47.

See also, Borough of West Chester v. Lal, 493 Pa. 387, 426 A.2d 603 (1981). The essence of the double jeopardy clause and the concept of notice to the defendant that is central to the idea of due process of law work in conjunction to invest such phrases with a talismanic quality; both precepts combine to place the risk of such a mishap on the prosecution and to confer a windfall on a defendant in the sense of preventing review of the propriety of what is otherwise a ruling on a matter of law. Realistically, because, like all individual constitutional rights, the prohibition against double jeopardy is by design in favorem vitae, the label, in these circumstances, is indistinguishable from the sentence.

A good argument can be made for viewing the holding in Martin Linen as a basic example of this category of case and little more. Id., 430 U.S. at 571-572. Indeed, given the title and terminology of Fed. R. Crim. P. 29(c) and its inextricable confusion of factual and legal grounds, a good case can be made for the fact that the double jeopardy bar to further review that is incidental to rulings granting defense motions for judgment of acquittal is obliged by virtue of its "label." While it may be sound policy for the federal courts to handle these rulings in this fashion, Pennsylvania asserts that, in light of the foregoing analysis, it is hardly a matter of constitutional mandate.

as a matter of law, sufficient evidence, if believed, to convict the accused beyond a reasonable doubt and that the trial court's ruling was simply wrong, and that the accused should face the fact finder. It is this second scenario that must be reconciled with double jeopardy principles. The result in Commonwealth v. Zoller, 507 Pa. 344, 490 A.2d 394 (1985) demonstrates the illogic of recognizing absolute finality to the grant of a demurrer in Pennsylvania, and thus, the need for appellate review of the same. Zoller, 507 Pa. at 349-50, 490 A.2d at 396. In Zoller, consolidated on appeal and decided as a companion case to Smalis, the trial court determined that the evidence did not establish the element of general criminal intent and sustained defense demurrers to charges of Aggravated

Assault, Simple Assault, Recklessly Endangering Another Person and Criminal Conspiracy. Zoller, 507 Pa. at 309, 495 A.2d at 396. The Pennsylvania Superior Court determined that the trial court had erred in sustaining a demurrer since the trial court's assessment of the evidence as it related to proving the crimes charged was incorrect. Commonwealth v. Zoller, 318 Pa. Super. 402, 465 A.2d 16 (1983). Nevertheless, the Pennsylvania Superior Court was constrained to accept the error by virtue of its earlier ruling in Commonwealth v. Smalis, 331 Pa. Super. 307, 480 A.2d 1046 (1984), which had likened the demurrer to an acquittal.

As was clearly expressed with presently applicable acumen in United States v. Scott, 437 U.S. 82 (1978):

> This is scarcely a picture of an all-powerful state

> relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact. It is instead a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt.

Scott, 437 U.S. at 97 (emphasis added). While it may be a general rule that this Court, when applying the principles of the Double Jeopardy Clause, does not concern itself with discerning the actual factual guilt or innocence of an accused, it nonetheless must remain a countervailing rule that this Court always concerns itself with the fairness of the proceedings to both parties. Arizona v. Washington, 434 U.S. 497, 505 (1978).

It is plain that under Pennsylvania law, an accused, moving pursuant to Pa. R. Crim. P. 1124(a)(1), requests a ruling of law exclusively; nothing is submitted to a factfinder in a bench or jury proceeding. Simply but accurately stated, there is no fact finder at that point in the proceeding under Pennsylvania law; thus, there is no "acquittal" based on resolution of factual matters. To allow an accused the windfall of dismissal under the general body of double jeopardy law or the more specific jurisprudence surrounding Fed. R. Crim. P. 29 at that point of the proceedings in Pennsylvania where neither is implicated, contravenes the spirit of the Double Jeopardy Clause and finds no support in its letter.[13] Thus, it can only be concluded here as it was in Scott that:

> We now conclude that where the defendant himself seeks to have the trial terminated without any submission to either judge or jury as to his guilt or innocence, an

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FOOTNOTE 13, FROM PAGE 52.

In United States v. Tateo, 377 U.S. 463, 466 (1964), this Court unequivocally stated that there is an interest to be heavily weighed, one overlooked by the Smalises, but which must now enjoy the considered attention of this Court:

"While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the Ball principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as

FOOTNOTE 13 CONTINUED ON PAGE 54.

> appeal by the Government from his successful effort to do so is not barred by 18 U.S.C. §3731 (1976 ed.).
>
> Here, 'the lessons of experience' indicate that Government appeals from midtrial dismissals requested by the defendant would significantly advance the public interest in assuring that each defendant shall be subject to a just judgment on the merits of his case, without 'enhancing the possibility that even though innocent he may be found guilty.'

Scott, 437 U.S. at 102, quoting Green v. United States, 355 U.S. 184, 185 (1957). See also, Commonwealth v. Zoller, 507 Pa. at 353-54, 490 A.2d at 399 (Scott makes clear that the real function of the Double Jeopardy Clause is to safeguard acquittals, rather than to bar

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FOOTNOTE 13, CONTINUED FROM PAGE 53.

> society's interests. The underlying purpose of permitting retrial is as much furthered by application of the rule to this case as it has been in cases previously decided."
>
> Tateo, 377 U.S. at 466.

successive trials per se, citing Whitebread, Criminal Procedure, §24.03 (1980)).

The "lessons of experience" referred to in Scott, supra, if accurately applied to Pennsylvania, instruct any thoughtful observer, appreciative of Scott's wisdom, that a demurrer both by its history and by current function must be subject to appellate review.

DISCUSSION AND PRECISE APPLICATION OF UNITED STATES SUPREME COURT JURISPRUDENCE

What remains then of petitioners' argument is language in several decisions of this Court which petitioners loosely construe and offer to this Court as sufficient reason to bar the prosecution appeal of a demurrer sustained pursuant to Pa. R. Crim. P. 1124(a)(1). It presently is not.[14]

In Scott, the court discussed what it termed two venerable principles of

double jeopardy jurisprudence: (1) the successful appeal of a judgment of conviction, on any other ground other than

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FOOTNOTE 14, FROM PAGE 55.

See also, Westin, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 Mich. L.R. 1001, 1040-42 (1980)(where an analysis of, inter alia, Burks, Scott and Martin Linen was undertaken and the following comment resulted:

"Significantly, the Court also allows the state to retry a defendant following the reversal on appeal of an erroneous ruling by a judge in his favor, except where the ruling is followed by a jury acquittal or where the ruling represents deliberate harassment or overreaching. To be sure the foregoing statement is not entirely consistent with all of the Court's recent decisions (because the Court's recent decisions are not consistent with one another), but it is the most coherent principle that emerges from those decisions. It is coherent because it corresponds with the established balance of values — i.e., the balance between a defendant's interest in finality and the state's interest in prosecution — that underlies the Ball principle. It brings coherence to the jurisprudence of double jeopardy by rendering the two lines of cases consistent with one another. It gives the state the same right to retry a defendant following an erroneous ruling by a

FOOTNOTE 14 CONTINUED ON PAGE 57.

the insufficiency of the evidence to support the verdict poses no bar to further prosecution on the same charge, Scott, 437 U.S. at 91-92, citing Burks v. United States, 437 U.S. 1 (1978); and (2) a judgment of acquittal whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial could be necessitated by reversal. Scott, 437

FOOTNOTE 14, CONTINUED FROM PAGE 56.

judge in his favor as the state now has to retry him following an erroneous judgment against him. And it does so based on the premise that there is no distinction regarding either of the defendant's interest in finality or the state's interest in prosecution that justifies according greater finality to an erroneous judge-made ruling in a defendant's favor than to an erroneous ruling against him."

Id. (Footnotes omitted; emphasis in original). See also, La Fave and Israel, Criminal Procedure, §24.4 (1985).

U.S. at 92. Brief for Petitioners at 14; Brief for Amicus Curiae, American Civil Liberties Union, at 6.

Insofar as the petitioners choose to rely on the first principle enunciated in Scott, as to the successful appeal of a judgment of conviction or any other ground other than the insufficiency of the evidence to support the verdict, such reliance ultimately must find its source in Burks v. United States, 437 U.S. at 1. Any notion that the principle enunciated in Burks can be dispositive of the issue at bar is misplaced. Accurately and precisely read, the Burks court attempted to resolve the inconsistencies that had developed in its decisions in regard to the remedy to be applied to appellate reversals of convictions when the reviewing court determined upon final review that the evidence was insufficient to convict Burks, 437 U.S. at 17.[15]

First, it must be noted that the Burks court framed the issue in the following terms: "Given this posture we are squarely presented with the question of whether a defendant may be tried a second time when a reviewing court has determined that in a prior trial the evidence was insufficient to sustain the verdict of the jury." Burks, 437 U.S. at 6 (emphasis added; footnote omitted).

The jury had rejected defendant Burks' insanity defense and found him guilty; however, Burks requested and received reversal of that guilty verdict on appeal. Burks, 437 U.S. at 4. Burks' motion for acquittal at the close

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FOOTNOTE 15, FROM PAGE 58.

See, Burks, 437 U.S. at 5211, discussing Bryan v. United States, 338 U.S. 552 (1950), Saprin v. United States, 348 U.S. 373 (1955), Yates v. United States, 354 U.S. 298 (1957), Forman v. United States, 361 U.S. 416 (1960).

of all the evidence based on insufficiency of the evidence was denied prior to submission of the case to the jury, and his post-verdict motion for new trial, also based on insufficiency of the evidence, was likewise denied. Burks, 437 U.S. at 4. The Court of Appeals reversed the conviction, agreeing with Burks that the evidence was insufficient to support the verdict and remanded the case for determination of whether a directed verdict of acquittal should be entered or a new trial ordered. Burks, 437 U.S. at 5. This Court then determined that the Double Jeopardy Clause precluded the second trial once the reviewing court has found the evidence legally insufficient. Burks, 437 U.S. at 19. The Burks court undertook reconsideration of its earlier decisions that had permitted retrial to

follow a reviewing court's determination that the evidence was insufficient to convict and stated:

> We hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only just remedy orderable for that court is the direction of a judgment of acquittal.

Burks, 437 U.S. at 19 (emphasis added).

Pennsylvania today does not take issue with that particular result but maintains that, notwithstanding some language to the contrary in Burks itself, Burks is limited to final appellate reversals for reasons of insufficient evidence. See, Burks, 437 U.S. at 16-17. A close reading of that court's decision demonstrates that the Burks court focused on, and sought to distinguish between, reversals based on trial error, e.g., incorrect

receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct, and appellate reversals due to failure of proof at trial. Burks, 437 U.S. at 15. The court's statement indicates as much:

> In short, reversal for trial error as distinguished from evidentiary insufficiency, does not constitute a decision to the effect the Government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Further, it is the determination that the defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt, free from error, just as society maintains a valid concern for insuring that the guilty are punished. See, Note, Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence, 31 U. Chi. L. Rev. 365, 370 (1964). The same cannot be

> said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal -- no matter how erroneous its decision -- it is difficult to conceive how society has any greater interest in retrying a defendant when, on review it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Burks, 437 U.S. at 16-17 (emphasis added).

Thus, the essential discussion in Burks and the actual holding of that court concerned itself specifically with appellate reversals of convictions that were the result of improvidently allowing the fact finder to

deliberate on a legally insufficient predicate. Burks, 437 U.S. at 6, 16-17.[16] Given the full opportunity to run its course, Pennsylvania procedure fully complies with the decision in Burks and the Double Jeopardy Clause of the Fifth Amendment.

Insofar as Burks states more broadly that a defendant cannot be retried following a judgment of acquittal, Burks, 437 U.S. at 11-12, application of that notion does not apply to Pennsylvania procedure at the demurrer stage, Pa. R. Crim. P. 1124(a)(1), but applies rather at that point in the Pennsylvania scheme, Pa. R.

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16 In the sense that the rule barring retrial has been held to be confined to cases where "the prosecution's failure is clear," Tibbs v. Florida, 457 U.S. 31, 42, Pennsylvania asserts that this requisite is only certainly demonstrated, in disputed cases, when appellate review is afforded.

Crim. P. 1124(a)(2), at which a judgment of acquittal is provided. In any event, the authority supporting the broad statement of the Burks court has not remained completely intact. In regard to Martin Linen Supply Company, 430 U.S. 564, 571 (1977), cited in Burks at 437 U.S. 11, Martin Linen relied heavily on United States v. Jenkins, 420 U.S. 358, 370 (1975) and the "further proceedings test" espoused therein. See, Martin Linen Supply Company, 430 U.S. at 571. Jenkins and the "further proceedings test" has been expressly repudiated in United States v. Scott, 437 U.S. at 87, decided the same day as Burks. Thus, in light of Scott and the extreme reliance Burks and ultimately petitioners place on Martin Linen Supply and the cases cited therein, such reliance is

suspect, or at least open to re-evaluation. It should also be noted that the Scott court referred to one, and possibly two, of those decisions cited in Martin Linen as being cases raising double jeopardy questions in highly unusual circumstances. See, Scott, 437 U.S. at 90-91, citing Kepner v. United States, 195 U.S. 100 (1904); Fong Foo v. United States, 369 U.S. 141 (1962).[17] Conversely, the entirety of Pennsylvania procedure

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17 As far as the case at bar withstanding the impact of the oft-cited decision of Fong Foo, 369 U.S. 142, it is apparent in the Fong Foo Opinion that the court relied on the existence of several factors, which although present in Fong Foo, are absent herein: (1) the proceeding terminated with the entry of a jury verdict of acquittal and subsequent formal judgment of acquittal entered by the trial court; (2) and (3) that the trial court had based its decision to direct the jury to enter a verdict of acquittal by virtue of the

FOOTNOTE 17 CONTINUED ON PAGE 67.

detailed in Pa. R. Crim. P. 1124 and the case law interpreting it, reveal a logical procedure, of which demurrer

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FOOTNOTE 17, CONTINUED FROM PAGE 66.

trial court's determination that the prosecution's witnesses were not worthy of belief, and/or there was such a high degree of prosecutorial misconduct that the trial had to be aborted and the defendant acquitted in terms of the standard recognized today under Oregon v. Kennedy, 456 U.S. 667 (1982). Fong Foo, 369 U.S. at 143-44.

Pennsylvania thus maintains that Fong Foo fails to be impressive to the extent necessary to reverse the determination of the Pennsylvania Supreme Court since it is again apparent the demurrer sustained by the trial court here under Pennsylvania law does not amount to the acquittal entered in Fong Foo. There in contra-distinction to circumstances present here the trial court engaged in a credibility determination; the same is explicitly prohibited under the Pennsylvania standard governing consideration of demurrers. Fong Foo, 369 U.S. at 144. Also in Fong Foo, prosecutorial overreaching may have served as the basis for the acquittal, id.; there is absolutely no allegation or issue raised as to improper conduct by the prosecution in the present case. Consequently, the expansive application of Fong Foo that has occurred in the past is not applicable to the present situation.

is one part, which draws support from a consistent, well-reasoned and long-standing body of law. Compare, Hudson v. Louisiana, 450 U.S. at 42, n. 1 (Louisiana rules of criminal procedure were woefully inadequate in terms of providing an accused an opportunity to challenge the sufficiency of the prosecution's case. Thus where Louisiana forced the defendant to proceed to verdict before a fact finder, retrial was barred upon post-verdict determination of insufficient evidence) United States v. DiFrancesco, 449 U.S. 117 (1980)(appellate review of a sentence at the insistence of the government does not offend that part of the double jeopardy protection which bars reprosecution because the adverse consequences of retrial have no significant application to the prosecution's statutorily granted right to review a sentence).

The Commonwealth of Pennsylvania, therefore, respectfully submits that the dicta in United States v. Scott, on which petitioners lay such heavy reliance to the effect that review is barred following a determination that the evidence is insufficient, should not be viewed as dispositive.

Similarly, petitioners attempt to rely on the second principle stated in Scott, that a judgment of acquittal whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by reversal, Scott, 437 U.S. at 92, must also fail for the following reasons.

First, in the present case, we are not faced with an "acquittal" whereby such a sanction would be

invoked. It has been demonstrated hereinabove, see, infra at 33-44, that a demurrer granted under Pennsylvania law does not, in form or in substance, amount to an acquittal as the term is understood and utilized in Scott. It must be emphasized that in Scott, the court stated that an acquittal is a "ruling of the judge, whatever its label, [which] actually represents a resolution in the defendant's favor, correct or not, of some or all of the factual elements of the offense charged." Scott, 437 U.S. at 98, quoting Martin Linen Supply Company, 430 U.S. at 571.[18]

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18 Consequently, it can only be at this point that an accused's interest in "finality" arises. A thorough and precise discussion of that concept is set forth in Westin and Drubel, Toward a General Theory of Double Jeopardy, 1979 Sup. Ct. Rev. 81.

Under Pa. R. Crim. P. 1124(a)(1), there is no factual resolution, correct or incorrect, save to admit all favorable facts and inferences therefrom. This is strictly insured by application of the standard of review. Zoller, supra. The ruling of the judge can be correct or incorrect only insofar as the court's ruling correctly applies Pennsylvania statutory and case law. Under Pennsylvania procedure, this cannot be viewed as anything other than what it is, a ruling of law by the trial court that interrupts an otherwise proper proceeding. As such, this is not "the State with all its resources and power making repeated attempts to convict an individual," Green, 355 U.S. at 187, but rather it is now the prosecution, by virtue of appeal, attempting to secure "one fair opportunity" to

convict, Burks, 437 U.S. at 16-17, where "the defendant elected to seek termination of the trial on grounds unrelated to guilt or innocence." Scott, 437 U.S. at 97. See also, Wade v. Hunter, 336 U.S. 684, 688-89 (1949)("The double jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressible practices at which the double jeopardy prohibition is aimed ... What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some

instances be subordinated to the public's interest in fair trials designed to end in just judgments.").

Second, regardless of the fact that this case does not present the Court with an "acquittal," reliance on the second principle stated in Scott is nonetheless still foreclosed. In pertinent part, the statement the Smalises primarily rely on is that "A judgment of acquittal ... may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal." Scott, 437 U.S. at 92 (emphasis supplied). The immediately aforementioned emphasized language in Scott is an obvious reference to the "further proceedings test" of United States v. Jenkins, 420 U.S. 377 (1975). However, the court in Scott disavowed that test:

> Yet, though our assessment of the history and meaning

of the Double Jeopardy Clause in Wilson, Jenkins, and Serfass v. United States, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed. 2d 265 (1975), occurred only three Terms ago, our vastly increased exposure to the various facets of the Double Jeopardy Clause has now convinced us that Jenkins was wrongly decided. It placed an unwarrantedly great emphasis on the defendant's right to have his guilt decided by the first jury empaneled to try him so as to include those cases where the defendant himself seeks to terminate the trial before verdict on grounds unrelated to factual guilt or innocence. We have therefore decided to overrule Jenkins, and thus to reverse the judgment of the court of appeals.

Scott, 437 U.S. at 87-88 (emphasis added).

Correctly read, Scott thus supports the proposition advanced by Pennsylvania. Petitioners' attempt to support their argument by isolating portions of the Scott Opinion without proper reference to and consideration

of the entirety of the discussion in Scott and other relevant decisions of this Court, although initially possessed of superficial appeal, becomes dispossessed of merit and cannot bear the weight of its own cited authority when closer attention is given.

Accurate analysis of the decisions of this Court reveals that: (1) the Burks decision limits itself to barring retrials where a reviewing court, on final review of the question, has already determined the prosecution's case lacks sufficient evidence to convict; (2) a demurrer under Pennsylvania procedure is purely a legal determination not encompassing or intimating any notion of an acquittal, as that term has been interpreted by this Court (see, e.g., Tibbs, 457 U.S. 31, 42-43 (1982)); and (3) the further proceedings test of Jenkins being

explicitly disavowed by this Court in Scott, renders inapplicable that portion of the language in Scott relied on by petitioners.

Where the accused seeks and receives a favorable ruling of law from the trial court, the Scott court provides dispositive reasoning:

> We think that in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant. We do not thereby adopt the doctrine of 'waiver' of double jeopardy rejected in Green. Rather, we conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice. In Green the question of the defendant's factual guilt or innocence of murder in the first degree was actually submitted to the jury as a trier of fact; in the present case, respondent successfully avoided such a submission of the first count of the indictment by persuading the trial court to dismiss it on a basis which did not depend on guilt or innocence. He was thus neither acquitted nor convicted because he himself successfully undertook to persuade the trial court not to submit the issue of guilt or innocence to the jury which had been empaneled to try him.

Scott, 437 U.S. at 99 (emphasis added; footnote omitted).

Pennsylvania also submits that comparison of Martin Linen Supply Company, 430 U.S. 564 (1977) and the case at bar further demonstrates the validity of the result reached by the Pennsylvania Supreme Court.

In Martin Linen, the court stated, regarding judgments of acquittal entered pursuant to Fed. R. Crim. P. 29(c), tnat "those judgments, according to the very wording of the Rule,

act to terminate a trial in which jeopardy has long since attached." Martin Linen, 430 U.S. at 571 (emphasis added; footnote omitted).

Although perhaps the wording is only one factor to consider, nevertheless Pennsylvania's statutory provision indisputably provides for the distinction between a demurrer and an acquittal, a distinction absent under federal law. The court noted that it has emphasized that what constitutes an "acquittal" is not to be con trolled by the form of the judge's action. Martin Linen, 430 U.S. at 572, citing United States v. Sisson, 399 U.S. 267, 307-308 (1970); United States v. Wilson, 420 U.S. at 336.

Beyond that, however, in comparison to Pa. R. Crim. P. 1124(a)(1) and the case law thereto, the Martin Linen court stated:

> There can be no question that the judgments of acquittal entered here by the District Court were 'acquittals' in substance as well as form. The District Court plainly granted the Rule 29 (c) motion on the view that the Government had not proved facts constituting "criminal contempt. The court made only too clear its belief that the prosecution was 'the weakest [contempt case that] I've ever seen.'" 534 F.2d at 587. In entering the judgment of acquittal, the court also recorded its view that 'the Government has failed to prove the material allegations beyond a reasonable doubt' and that "defendant should be found 'not guilty.'"
>
> Thus, it is plain that the District Court in this case evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction. The Court of Appeals concluded that this determination of insufficiency of the evidence triggered double jeopardy protection.

Martin Linen, 430 U.S. at 571-72 (emphasis added; footnote omitted).

Thus, it is clear that in Martin Linen the trial court undertook a fact finding function to the full extent of evaluating the evidence and determined that the prosecution had failed to prove the accused guilty beyond a reasonable doubt. Martin Linen, 430 U.S. at 573. It should be noted that Martin Linen provided comment on the instances where the criminal prosecution is presented to a judge alone. Martin Linen, 430 U.S. at 573, n. 12.[19] Pennsylvania draws attention to two things in that regard. First, the court's statement rested on United States v. Jenkins, 420 U.S. 358, 365-367 (1975), which has seen its holding and rationale substantially eroded in United States v. Scott, 437 U.S. at 87-88. Secondly, Pennsylvania seeks

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FOOTNOTE 19 CAN BE FOUND ON PAGE 81.

affirmance of its right to appeal from the grant of a demurrer and to retry an accused, regardless of whether the proceeding is a bench or jury trial. Insofar as this Court chooses to limit its decision to a bench trial, Pennsylvania contends that the recommencement of trial proceedings subsequent

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FOOTNOTE 19, FROM PAGE 80.

There, the court stated:

> [I]n the situation where a criminal prosecution is tried to a judge alone, there is no question that the Double Jeopardy Clause accords his determination in favor of a defendant full constitutional effect. See United States v. Jenkins, 420 U.S. 358, 365-367, 95 S.Ct. 1006, 1010-1011, 43 L.Ed.2d 250 (1975). Even though, as proposed here by the Government with respect to a Rule 29 judgment of acquittal, it can be argued that the prosecution has a legitimate interest in correcting the possibility of error by a judge sitting without a jury, the Court in Jenkins refused to accept theories of double jeopardy that would permit reconsideration of a trial judge's ruling discharging a criminal defendant.

Martin Linen, 430 U.S. at 573, n. 12.

to the reversal of the Orders sustaining petitioners' demurrers would not contravene any of the protections of the Double Jeopardy Clause as enumerated in North Carolina v. Pearce, 396 U.S. 711, 717 (1969); United States v. Wilson, 420 U.S. at 343. More recently, this Court has stated that, "The primary goal of barring reprosecution after acquittal is to prevent the State from mounting successive prosecutions and thereby wearing down the defendant[,] [while] ... the primary purpose of foreclosing a second prosecution after conviction, on the other hand, is to prevent a defendant from being subjected to multiple punishment for the same offense." Justices of Boston Municipal Court v. Lydon, ___ U.S. ___, 104 S.Ct. 1805, 1813 (1984). Petitioners would not be subject to a second trial after acquittal, nor, of

course, would they be subject to a second trial after conviction. As Judge Johnson correctly noted in his dissenting Opinion in the Pennsylvania Superior Court, "The procedural posture of the instant case reveals that no danger of a second trial is present if the Commonwealth is permitted to appeal the instant orders. The trial court merely sustained appellees' demurrers to the charges. No dismissal of these charges nor discharge of appellees as to this count occurred. In fact, the remaining charges concerning the Chances R fire were stayed, pending the resolution of the appeal." Commonwealth v. Smalis, 331 Pa. Super. 307, 324, 480 A.2d 1046, 1055 (1984) (Johnson, J., dissenting). Thus, should the Commonwealth prevail, the proceedings in the lower court would merely recommence at the stage where

they were temporarily halted as a result of the within appeal, and, therefore, there clearly is no "danger of 'affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.'" Lydon, ___ U.S. at ____, 104 S.Ct. at 1815, quoting Burks v. United States, 437 U.S. 1, 11.

This principle applies similarly to a jury trial which is interrupted by the improvident granting of a demurrer. The convening of a second jury following appellate reversal of the demurrer Order would not constitute a second prosecution after acquittal or after conviction. Furthermore, the discharge of the jury under these circumstances would result from a manifest necessity, and therefore retrial would be permissible. This Court has explained as follows the

rationale for permitting retrial following the discharge of a jury by reason of a manifest necessity:

> Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges of the accused. Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.[16]

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In his opinion announcing the Court's judgment in United States v. Jorn [400 U.S. 470, 479-480 (1971)], Mr. Justice Harlan explained why a rigid application of the 'particular tribunal' principle is unacceptable: '[A] criminal trial is, even

> in the best of circumstances, a complicated affair to manage. ... [It is] readily apparent that a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide.'

Arizona v. Washington, 434 U.S. 497, 505 (1978). Under circumstances in which a jury is discharged as a result of an erroneous ruling of law by the trial judge prior to acquittal or conviction -- such as the improvident granting of a demurrer -- such discharge would be the result of a "manifest necessity," and therefore retrial before a new tribunal would be appropriate and not violative of double jeopardy principles. See, generally, Wade v. Hunter, 336 U.S. 684 (1949).

Pennsylvania further suggests that double jeopardy principles are not contravened where proceedings recommence following the appellate reversal of the trial court's improvident entry of a demurrer because, under such circumstances, jeopardy in fact never terminated. In Lydon, this Court commented, "In Price v. Georgia, 398 U.S. 323, (1970), [the United States Supreme Court] recognized that implicit in the Ball rule permitting retrial after reversal of a conviction is the concept of 'continuing jeopardy.' ... That principle 'has application where criminal proceedings against an accused have not run their full course.' ... Interests supporting the continuing jeopardy principle involve fairness to society, lack of finality and limited waiver." Justices of Boston Municipal Court v. Lydon,

___ U.S. at ___, 104 S.Ct. at 1813-14, citing Breed v. Jones, 421 U.S. 519 (1975). The "continuing jeopardy" principle may properly be applied in the instant case where in fact the proceedings against the petitioners have not run their full course, but rather will recommence upon remand of the matter to the trial court, should the Commonwealth prevail. In accord with this principle is the fact that in moving for a demurrer, a defendant must be deemed to necessarily contemplate the potential results of such action. Certainly it is within the contemplation of defendants who move for a demurrer in the trial courts of Pennsylvania that the erroneous sustaining of such motion will result in further proceedings should the Order be reversed by a reviewing court. Thus, it can be concluded that a

defendant knowingly bears the burden of retrial should an erroneous legal ruling be reversed and by moving for a demurrer must be deemed to have waived a subsequent double jeopardy claim.[20] This result that obtains under Pennsylvania's view is also consistent with the determination in Green v. United States, 355 U.S. 184 (1957), where in addition to expressing what is now often referenced as the heart of any double jeopardy analyis,[21] this Court stated, "For here, the jury was

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20 Despina Smalis argued to the court below that such a waiver theory was rejected by this Court in Sanabria v. United States, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978). Sanabria, however, is inapposite to the case at hand, for that case dealt with the entry of a judgment of acquittal pursuant to the Federal Rules of Criminal Procedure, the erroneous entry of which is not appealable by the government. Thus, a waiver argument was not in fact rejected by this Court in the context present in the case at bar.

FOOTNOTE 21 CAN BE FOUND ON PAGE 90.

dismissed without returning any express verdict on that charge [First Degree Murder] and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Green, 355 U.S. at 191 (emphasis added). No such opportunity was

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FOOTNOTE 21 FROM PAGE 89.

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. ... as well as enhancing the possibility that even though innocent he may be found guilty."
>
> Green, 355 U.S. at 187-88. It is interesting to note that in Green as well as the case at bar the defendants were charged with Homicide arising from the arson-related deaths of several individuals. See, Green, 355 U.S. at 185.

presented to a fact finder in the case at bar.

Petitioners also place reliance on the court's decision in Sanabria v. United States, 437 U.S. 54 (1978) but again misinterpret the extent and impact of the court's decision on the present circumstances. See Brief for Petitioners at 14-15; Brief for Amicus Curiae at 7, 10. Pennsylvania is safe in comparing Sanabria to the present case, since in Sanabria there was a finding of fact upon which the acquittal was based and there the Sanabria court stated that, "this finding of fact stands as an absolute bar to any further prosecution for participation in that business." Sanabria, 437 U.S. at 73 (footnote omitted)(emphasis added). In Pennsylvania a demurrer properly entered is devoid of factual findings and makes its mark on the

record purely as one of law. Furthermore, in Sanabria the prosecution apparently persuaded the circuit court that the trial court's judgment of acquittal could be bifurcated on appeal by deeming one half an appealable "dismissal" and letting the other half remain a non-appealable dismissal. Sanabria, 437 U.S. at 62. For obvious reasons, this is an unacceptable course of proceeding and otherwise has no relation to this case.

In so doing, the circuit court allowed the prosecution to escape from: (1) a perceived deficiency in their charging document and (2) a consequent erroneous evidentiary ruling by the trial court. Sanabria, 437 U.S. at 62.

However, this Court made it clear that there was no question that the nature of the trial court's Order was

that of an acquittal and that the prosecution or circuit court's eleventh hour attempt to bifurcate the Order of acquittal, and in effect relabel part of the Order to cure what ultimately was not an evidentiary deficiency but a defect in their Indictment was unacceptable. Sanabria, 437 U.S. at 62-63. Thus, this Court, by enforcing the original Order of full acquittal, preserved the finality that attaches to an Order of acquittal and rejected the prosecution's convenient attempt to rationalize an escape from its consequences.

The Sanabria court emphasized the importance of both the wording of the Order and what the Order contemplates and communicates at time of issuance. Sanabria, 437 U.S. at 59, 68. The court took pains to emphasize as much by including the exact and entire text

of the trial court's Order in the body of the Opinion as follows:

> It is hereby ORDERED that the defendant Thomas Sanabria be, and he hereby is, acquitted of the offense charged, and it is further ORDERED that the defendant Thomas Sanabria is hereby discharged without delay [sic].

Sanabria, 437 U.S. at 68. Cf. Borough of West Chester v. Lal, supra. Patently, it does not compare to this case.

Pennsylvania's Rule 1124(a)(1) contemplates and communicates no express or implied notions of acquittal. Furthermore, the statutory scheme (Pa. R. Crim. P. 1124(a)(1), (2), (3), (4)) under which the defendant requests the trial court's ruling, makes it clear that the concept and request for acquittal is reserved for those junctures so specified, Rule 1124(a)(2),

(3) and (4), exclusive from Rule 1124 (a)(1).[22]

Therefore, Pennsylvania, by means of the complete format of its Rule 1124, avoids the problem that ripened

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22 The decision in People v. Brown, 40 N.Y.2d 381, 353 N.E.2d 811 (1976) serves as an interesting point of comparison in the present dispute. The New York Court of Appeals therein held that double jeopardy worked to bar the appeal by the prosecution of a "trial court order of dismissal" of the charges on the grounds of insufficient evidence that had been entered on defendant's motion at the close of the People's case. The statutory authorization under New York law for the entry of such an order is materially identical to Pa. R. Crim. P. 1124(a)(1). Id., 353 N.E. 2d at 813, n. 2. The Opinion of the Brown court, however, is instinct with the recognition that its holding is obligated by that aspect of this Honorable Court's decision in United States v. Jenkins, supra, which has since been overruled. Id., 353 N.E.2d at 817; e.g., 819 ("In sum we conclude that the issue presented in this case is directly controlled by the analysis articulated by the Supreme Court in the Wilson, Jenkins and Serfass decisions and, in particular, by the ratio decidendi in Jenkins").

FOOTNOTE 22 CONTINUED ON PAGE 96.

in Sanabria by having in place a precise and logical statuory scheme -- its prcvisions, standards and consequences clear at each step.

Thus, in favorable comparison to Sanabria, here, there are no findings of fact present and no prosecution attempts to avoid the ramifications of an acquittal, so contemplated and expressed by a trial court in its ruling.

FOOTNOTE 22, CONTINUED FROM PAGE 95.

The Commonwealth of Pennsylvania in the present case necessarily submits that an opposite result, as the consequence of the change in the underlying decisional authority, would not be obliged in comparable circumstances. Since the demise of Jenkins, New York courts have recognized, at least, that the rationale and authority of Brown consequently should be comprehensively reappraised in light of current controlling authority. People v. Key, 45 N.Y.2d 111, 379 N.E.2d 1147 (1978); People v. Boynton, 67 A.D. 982, 413 N.Y.S.2d 431 (1979).

With that in mind, the principle that began the analysis in Sanabria, but was unable to withstand the facts of Sanabria, remains applicable herein:

> In United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975), we found that the primary purpose of the Double Jeopardy Clause was to prevent successive trials, and not Government appeals per se. ... That a new trial will follow upon a Government appeal does not necessarily forbid it, however, because in limited circumstances a second trial on the same offense is constitutionally permissible.

Sanabria, 437 U.S. at 64.[23]

The case at bar presents only an attempt by the prosecution to obtain one fair opportunity to convince a fact finder of guilt, by attempting to

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FOOTNOTE 23 CAN BE FOUND ON PAGE 98.

secure review of an erroneous ruling of law that has worked a dismissal of the charges. This does not implicate, let alone transgress, double jeopardy concerns except insofar as this Court chooses to ignore: (1) the larger schematic involved in Pa. R. Crim. P. 1124; (2) Pennsylvania jurisprudence to this date; and, (3) its own enlightened application of double jeopardy principles which preserve the broader principle itself and the concept of "acquittal" implicated therein.

FOOTNOTE 23, FROM PAGE 97.

The court there enumerated the many instances where a government appeal is not barred by the double jeopardy clause. See, Sanabria, 437 U.S. at 64, n. 15 (citing United States v. Ball, 163 U.S. 662, 672 (1896) (where the defendant successfully appeals his conviction); Wade v. Hunter, 336 U.S. 684 (1949)(where a mistrial is declared for manifest necessity); United States v. Dimitz, 424 U.S. 600 (1976)(where a defendant requests a mistrial in the absence of prosecutorial or judicial overreaching)).

CONCLUSION

State court procedure, like that of Pennsylvania, which limits the authority of a criminal court to rule upon the sufficiency of evidence solely as a matter of law and, as a result of that limitation, permits appellate court review of that ruling, is not in contravention of the applicable standards of the Double Jeopardy Clause of the Fifth Amendment. The appeal by the Commonwealth of Pennsylvania in the instant case seeks state court review of an Order preventing the prosecution from obtaining one fair and complete opportunity to convince a fact finder of the defendants' guilt. The Pennsylvania Supreme Court's recognition of the right of review should be left undisturbed and the

the Order of the court dated March 29, 1985, should be affirmed.

Respectfully submitted,

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REPLY

BRIEF

NO. 85-227

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1985

DESPINA SMALIS and ERNEST SMALIS,

Petitioners

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

REPLY BRIEF FOR PETITIONERS

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THE ARGUMENT OF THE SOLICITOR GENERAL THAT A DEFENDANT WHO SUCCESSFULLY SEEKS A "LEGAL" ACQUITTAL FROM THE TRIAL COURT ASSUMES THE RISK OF PROSECUTION APPEAL AND RETRIAL IS UNTENABLE

The Solicitor General asks, essentially, that the dividing line established by Sanabria v. United States, 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978) and United States v. Scott, 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 232 (1978) be redrawn to hold that a defendant waives his double jeopardy rights by asking, during the trial, for any relief to which he is not entitled, whether or not the issue he raises is related to guilt or innocence. The defendant, if he values his right to completion of the trial before the tribunal originally impaneled, must be careful not to "[lead] the trial court into error",[1] for an error "made at the

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[1]Brief for the United States as Amicus Curiae Supporting Respondent at 6.

behest of the defendant",[2] or, put another way, "at the instigation of the defense",[3] may be appealed; the trial becomes one that the defendant "managed to infect with error",[4] and its termination in favor of the defendant, even on the basis of the insufficiency of the evidence to prove guilt, is a stolen apple recoverable by the prosecution.

While the Solicitor General states that under such an approach "the defendant runs no risk of retrial by seeking any relief in the middle of trial unless in fact he is not entitled to that relief[]",[5] even the defendant represented by omniscient counsel able to unerringly

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[2] Id. at 6.

[3] Id., note 5 at 8.

[4] Id. at 8.

[5] Id., note 5 at 8.

predict whether an appellate court will, years later, find that "in fact he is not entitled to that relief" may also value his time, his money, and his mental health sufficiently that he dares not ask for any relief to which the prosecutor (who may not be aware of defense counsel's omniscience) may think he is not entitled; the prospect of appellate litigation, whether followed by retrial or not, would have a chilling effect on the assertion of <u>all</u> challenges to the sufficiency of the prosecution's evidence, however meritorious, under the tautological approach urged by the Solicitor General.

The <u>Sanabria</u>-<u>Scott</u> line imposes an election to forego double jeopardy objections to retrial only upon those defendants who, with or without good reason,[6] ask a trial court to decide

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[6] <u>Scott</u>, note 13 at 100, 98 S. Ct. at 2187, 2198, 57 L. Ed. 2d at 80.

an issue not related to guilt or innocence and customarily decided prior to trial. Ruling, on defense motion, upon the sufficiency of the evidence to convict is not a departure from the normal course of a trial. The line should stay where it has been drawn; as Your Honorable Court observed in Sanabria, to treat a request for a judicial ruling during trial as a waiver of double jeopardy rights "would undercut the adversary assumption upon which our system of criminal justice rests . . . and would vitiate one of the fundamental rights established by the Fifth Amendment." Id. at 79, 98 S. Ct. at 2186, 57 L. Ed. 2d at 63.

THE RESUMPTION OF THE NONJURY TRIAL WOULD INFRINGE THE INTEREST OF THE PETITIONERS IN AVOIDING MULTIPLE TRIALS

The strenuous argument of the Commonwealth and the Solicitor General that resumption of the nonjury trial before the same factfinder is not an impermissible second jeopardy ignores not only the interest of a defendant in the finality of an acquittal but the interest of a defendant in not being subjected to multiple prosecutions. The availability of the same judge, five years after the termination of the trial, does not render the proceeding on remand a constitutionally innocuous continuation of the first trial; as one commentator has observed:

> A defendant has a valued right to have his trial completed by a particular tribunal, not because he has a constitutional interest in the identity of any particular tribunal, but because he has an interest in being able "to conclude his confrontation with society" [footnote omitted] once it has begun. Once a trial begins, a defendant

has a legitimate interest in getting the trial over with "once and for all." [Footnote omitted.] It follows, therefore, that he also has an interest in continuing with "the first jury" [footnote omitted] impaneled in the case because changing the jury means interrupting the trial. To that extent, the defendant's interest in retaining the particular tribunal with which he began is merely an incident of his primary interest in being able to complete the trial itself. Westen and Drubel, Toward a General Theory of Double Jeopardy, 1978 Supreme Court Review 81, 90; emphasis added.]

Respectfully submitted,

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AMICUS CURIAE

BRIEF

No. 85-227

IN THE

Supreme Court of the United States

DESPINA and ERNEST SMALIS,

Petitioners,

—VS.—

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, AMICI CURIAE

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated to protecting the rights secured by the Constitution. The American Civil Liberties Union of Pennsylvania is one of its state affiliates. The ACLU has frequently appeared in this Court to defend the fundamental protections provided by the Double Jeopardy Clause. With the consent of the parties, indicated by letters being lodged with the Clerk, amici submit this brief to aid the Court in resolving the important double jeopardy question presented by this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief addresses the question whether the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, permits prosecution appeals of the grant of a demurrer, as defined by Pennsylvania law, in criminal cases, where reversal would require a new trial. More specifically, the question is whether the grant of a demurrer, which represents a judicial determination at the conclusion of the prosecutor's case that the prosecution's evidence, taken in its entirety and as truthful in every respect, is insufficient for conviction, is an acquittal that cannot be challenged on appeal.

After briefly reviewing the governing principles of double jeopardy law as set forth in this Court's cases, amici will examine the nature of the determination made

when a demurrer is granted, and compare it to similar decisions that federal courts render pursuant to Fed. R. Crim. Pro. 29(a). The federal courts have explored the question of when grants of motions for judgment of acquittal are appealable under the Fifth Amendment, and their decisions provide a useful guide for the determination of this case. Their rulings demonstrate that when a court grants a motion for judgment of acquittal at the conclusion of the prosecution's case-in-chief based on a determination that the prosecution's evidence was insufficient, the Double Jeopardy Clause bars an appeal. Since the grant of demurrer under Pennsylvania law is functionally indistinguishable from an acquittal for legal insufficiency under Rule 29 -- since it requires precisely the same inquiry federal courts undertake -- allowing Pennsylvania to appeal and, if successful, to retry the

defendants would impermissibly place them twice in jeopardy.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE PRECLUDES READJUDICATION OF CRIMINAL CHARGES WHICH ON DEMURRER TO THE PROSECUTION'S CASE WERE DISMISSED BY THE TRIAL COURT UPON A FINDING THAT THE EVIDENCE WAS INSUFFICIENT TO CONVICT.

A. The Double Jeopardy Clause Bars Retrials Following Trial Court Rulings Finding The Prosectuion's Completed Case Legally Insufficient.

Most of this Court's decisions delimiting the extent to which the government may appeal an adverse ruling that terminates a prosecution before entry of judgment are the result of interpretations of the federal statute granting the federal government the right to appeal in criminal cases, 18

U.S.C.A. §3731 (West. 1985)[1] The Court has generally indicated that the prosecution's right to appeal under this statute is coextensive with its right to appeal under the Double Jeopardy Clause to the Fifth Amendment to the United States Constitution.[2] United States v. DiFrancesco, 449 U.S. 117, 131 (1980); United States v.

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[1] This statute reads, in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution ...

[2] In our view, Justice Stevens' repeatedly expressed position (see, e.g., United States v. Martin Linen Supply, 430 U.S. 564, 576 (Stevens, J., concurring in the judgment)) that §3731 should be construed in accordance with the statutory language to preclude federal governmental appeals from acquittals is correct; but this case, arising from state court, presents no opportunity for the Court to conform its construction of §3731 to the principles of statutory construction frequently stressed in recent cases. e.g., United States v. Rojas-Contreras, 54 U.S.L.W. 4061, 4062 (1985).

Wilson, 420 U.S. 332, 337 (1975). For example, federal prosecutors have the right to appeal mid-trial rulings terminating cases in favor of defendant where such rulings are based on pre-indictment delay, United States v. Scott, 437 U.S. 82, 100 (1978), and post-conviction grants of motions to dismiss indictments based on pre-trial error, United States v. Wilson, 420 U.S. 332, 352-53 (1975). But there are clear limits on a sovereign's right to appeal, explained in Scott and of critical importance here:

> The successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, Burks v. United States, 437 U.S. 1, poses no bar to further prosecution on the same charge. A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal.

437 U.S. at 90-91 (emphasis added).

Although the path of true double jeopardy law has not run smoothly, the constitutional rule barring governmental appeals from "acquittals" (within the meaning of the Double Jeopardy Clause) where reversal would require a new trial, set out in Scott, has repeatedly commanded the assent of every member of this Court. See, e.g., Tibbs v. Florida, 457 U.S. 31 (1982); Arizona v. Rumsey, 81 L.Ed. 2d 164, 171 (1984); United States v. Martin Linen Supply Co., 430 U.S. 564, 570-72 (1977). And in defining "acquittals" for purposes of the double jeopardy clause,[3] the Court has repeatedly held that a determination by a trial court that the prosecution's evidence is

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[3] "[A] resolution, correct or not, of some of all of the factual elements of the offense charged." Lee v. United States, 432 U.S. 23, 30 n.8 (1977), quoting United States v. Martin Linen Supply Co., 430 U.S. at 571. See also Sanabria v. United States, 437 U.S. 54, 71 (1978).

insufficient as a matter of law to convict is an acquittal. See, e.g., Sanabria v. United States, 437 U.S. at 71 (legal determination that evidence was insufficient to convict was an acquittal, even though erroneous evidentiary rulings and unduly narrow construction of statute prejudiced government); United States v. Martin Linen Supply, 430 U.S. at 572 (acquittal following hung jury was "acquittal" for double jeopardy purpose where the "District Court...evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction); Hudson v. Louisiana, 450 U.S. 40, 43 (1981) ("our decision in Burks [v. United States, 437 U.S. at 1 (1978)] controls this case, for it is clear that petitioner moved for a new trial on the grounds that the evidence was legally insufficient to support the verdict and that the trial court granted the petitioner's verdict on that ground");

Arizona v. Rumsey, 81 L.Ed. 2d at 171 (acquittal of death sentence where trial court erred as a matter of law in finding evidence insufficient to show aggravating circumstances).

Similarly, the Court has repeatedly stressed that determinations by appellate courts that the evidence is insufficient as a matter of law to support a verdict also bar subjecting double jeopardy defendants to second trials. See, e.g., Burks v. United States, 437 U.S. at 2.[4]

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[4] Because the Pennsylvania Supreme Court has held in this case that a new trial would be required if the trial court's determination of legal insufficiency is reversed, see 490 A.2d at 396, this case does not present the question whether appeal of a post-conviction insufficiency acquittal may proceed when the state, if successful on appeal, could simply reinstate a conviction. Although some language in United States v. Wilson, 420 U.S. at 342-43, and United States v. Scott, 437 U.S. at 91 n.7 -- neither an insufficiency case -- suggests that appeal and reinstatement of conviction would not be barred, Burks, Hudson and their progeny plainly render "acquittals" (within the meaning of the double jeopardy clause) based on a determination of insufficiency the last word. There is no suggestion
(cont'd next page)

The Pennsylvania Supreme Court has not suggested that this Court, in resolving this case, should reexamine the double jeopardy rule barring retrials upon appeal from insufficiency acquittals applied in cases such as Burks, Hudson, Martin Linen, and Sanabria, and we see no reason for doing so. Accordingly, we turn to the central question here: whether the ruling at case here, and more generally demurrers in criminal cases under Pennsylvania practice, differ meaningfully from the insufficiency rulings at issue in Burks, Hudson, Martin Linen, and Sanabria.

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in the Court's opinion in Hudson that, if the insufficiency ruling were held erroneous, the jury verdict could have been reinstated. See also Burks, 437 U.S. at 16 ("[W]e necessarily afford absolute finality to a jury's verdict of acquittal . . . [and therefore to a trial judge's decision] as a matter of law that the jury could not properly have returned a verdict of guilty.")

B. The Demurrer Here Was Indistinguishable From -- Indeed Identical To -- The Legal Insufficiency Rulings That This Court Has Held Unappealable Where A New Trial Would Be Required.

The Pennsylvania Supreme Court's decision in the case at bar, as reported in Commonwealth v. Zoller, ___ Pa. ___, 490 A. 2d 394 (1985), respects the Scott reasoning insofar as it analyzes whether a demurrer, as utilized in criminal cases in Pennsylvania,[5] is the functional equivalent of an acquittal, or is instead equivalent to a dismissal on grounds not involving the merits. 490 A. 2d at 400. But the court plainly erred in

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[5] Demurrers are recognized in the Pennsylvania Rules of Criminal Procedure as follows:

> (a) A defendant may challenge the sufficiency of the evidence to sustain a conviction of one or more of the offenses charged by a :
>
> > (1) demurrer to the evidence presented by the Commonwealth at the close of the Commonwealth's case-in-chief ....

Pa. R. Crim. Pro. 1124(a)(1), Pa. C.S.A., tit. 42 (Purdon's 1985 pamph).

concluding, based on English common law related by William Blackstone[6] and more recent decisions of Pennsylvania's intermediate appellate court,[7] that Pennsylvania's demurrer falls into the latter category, and thus may be appealed by the prosecution. Zoller, 490 A. 2d at 401.

The distinction drawn by the Pennsylvania Supreme Court between this demurrer and a judgment on the merits is a

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6 "An issue upon the matter of law is called a demurrer and it confesses the facts to be true, as stated by the opposite party; . . . As, if the matter of the plaintiff's complaint of declaration be insufficient in law, . . . then the defendant demurs to the declaration . . . ." 3 W. Blackstone, Commentaries 314 (13th ed. 1800).

7 "In criminal cases demurrer to the evidence of the Commonwealth admits all the facts which the evidence tends to prove, and all inferences reasonably deducible therefrom. . . The court in such case is not the trier of the facts. The admissions implied in the demurrer leave for consideration the single inquiry whether the evidence introduced presents such a state of facts, with the inferences fairly arising therefrom, as would support a verdict of guilty. Commonwealth v. Williams, 71 Pa. Super. 311, 313 (1919) (citations omitted).

semantic one that ignores the practical realities underlying the traditional definition of a demurrer and this Court's double jeopardy analysis in Burks and its progeny. To be sure, under the statute governing prosecution appeals in Pennsylvania and its predecessors the Commonwealth has been permitted to appeal rulings sustaining demurrers to its prosecutions because they were deemed determinations of law and not of fact, and therefore within the statutory language authorizing state appeals. Commonwealth v. Long, 467 Pa. 98, 100 n.2, 354 A. 2d 569, 570 n. 2 (1976); Commonwealth v. Melton, 402 Pa. 628, 629, 168 A. 2d 328, 329 (1961).[8] But to label a demurrer a

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8 In Pennsylvania it is

> [T]he right and duty of the trial judge . . . to determine as a matter of law whether the proof has been sufficient in volume and quality to overcome the presumption of innocence. . . . Where the proof

(cont'd next page)

"question of law" for state law purposes is not to equate it to the questions of law at issue in such non-sufficiency cases as United States v. Scott and United States v. Wilson, supra.

A demurrer (like a Rule 29 acquittal) does raise a question of law; but the resolution of that legal question also requires findings and assessments of fact to determine whether the government has met its burden of proof as to a defendant's guilt. The substance of the demurrer procedure in Pennsylvania is indistinguishable from a

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fails to measure up to this standard, there is nothing to support a conviction and the prisoner is entitled to be discharged.

Commonwealth v. Byers 45 Pa. Super. 37, 39 (1910). Put another way, a demurrer should be sustained where, "as a matter of law," the Commonwealth's evidence is insufficient to warrant a jury's finding the defendant guilty beyond a reasonable doubt. Commonwealth v. Henderson, 451 Pa. 452, 454, 304 A. 2d 154, 156 (1973); Commonwealth v. Collins. 436 Pa. 114, 119, 259 A. 2d 160, 162 (1969): Commonwealth v. Dennis, 211 Pa. Super. 37, 40, 234 A.2d 53, 54 (1967).

judgment of acquittal following the prosecution's case, and both are indistinguishable from a classic jury determination when the defense rests without putting on any case: in the first two situations, and often in the third, the question is simply whether the evidence presented is sufficient to establish guilt.[9]

Historically, Pennsylvania has permitted the trial court to direct what it terms a verdict of acquittal only after both the

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[9] The purely arbitrary and semantic nature of the distinction Pennsylvania asks this Court to uphold here is emphasized by the Pennsylvania rule that where the trial court properly sustains a demurrer, but then goes on to pronounce the defendant "not guilty," the Commonwealth may not appeal. Commonwealth v. Haines, 410 Pa. 601, 603, 190 A. 2d 118, 120 (1963); Commonwealth v. Kerr, 150 Pa. Super. 598, 601-02, 29 A. 2d 340, 342 (1942). That is, the magic words "not guilty" constitute a final judgment of acquittal barring Commonwealth appeal, even though there is no state authority (in statute or case law) for such pronouncements or distinguishing cases when they are, or are not, appropriate. To permit retiral in the one case, but not the other, impermissibly exalts form over substance. Cf. United States v. Sisson, 399 U.S. 267, 285 (1970); Serfass v.United States, 420 U.S. 377, 392-93 (1975).

Commonwealth and defense have rested their cases. Of critical importance here, however, is that an identical test is utilized in ruling upon a motion for a directed verdict as for a demurrer, i.e., the court directs the jury to return a verdict of not guilty if the prosecutor's evidence and all inferences arising therefrom, considered in the light most favorable to the prosecution, are insufficient to prove beyond a reasonable doubt that the defendant is guilty.

Commonwealth v. Finley, 477 Pa. 382, 383 A 2d 1259 (1978); Commonwealth v. Boone, 467 Pa. 168, 354 A. 2d 898 (1975). Pennsylvania recognizes that the grant of a directed verdict is equivalent to a not guilty verdict and hence bars retrial and precludes appeals by the commonwealth. Commonwealth v. Thinnes, 263 Pa. Super. 79, 397 A. 2d 5 (1979); Commonwealth v. Wimberly, 488 Pa. 169, 411 A. 2d 1193 (1979); Wasserbly,

Pennsylvania Criminal Practice II, §27.23 (1981). (The procedures applicable to directed verdict have been codified by Pennsylvania Rule of Criminal Procedure 1124, eff. July 1, 1983.)

It is impossible to discern any policy underlying the Double Jeopardy Clause that would justify according a ruling that the prosecution's case was legally insufficient double jeopardy consequences when it is entered at the end of all the evidence (but before any verdict), but not when it is entered at the end of the prosecution's case, as Pennsylvania now proposes. In either event, the insufficiency ruling is final and not subject to appeal. Indeed, the question is not even open: this Court has repeatedly treated the two situations as identical, and has expressly rejected the distinction present here. See, e.g., United States v. Martin Linen Supply Co., 430 U.S. at 574-

75. Pursuant to Fed. R. Crim. Pro. 29(a), which abolished demurrers and directed verdicts in favor motions for judgment of acquittal, federal courts may dismiss for insufficiency before (of after) the taking of evidence is completed; but at least where there has been no conviction, and hence a reversal would require a retrial, see n.4 supra, the same double jeopardy result obtains in either situation. Id.[10]

Federal appellate courts that have heard prosecution appeals from grants of Rule 29(a) motions based upon the sufficiency of the

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10 Rule 29(a) provides:

Motions for directed verdict are abolished and motions for judgment of acquittal are to be used in their place. The court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment of information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defense may offer evidence without having reserved the right.

prosecution's evidence have uniformly dismissed them as barred by the Double Jeopardy Clause, and thus not encompassed by the statute permitting prosecution appeals. The United States Court of Appeals for the Eighth Circuit dismissed such an appeal in United States v. Jaramillo, 510 F. 2d 808 (8th Cir. 1975). Defendants charged with obstructing law enforcement officers attempting to quell a disturbance on an Indian reservation moved, after both sides had rested but before verdict, for a judgment of acquittal. 510 F. 2d at 809. The trial court granted the Rule 29(a) motion after considering all of the evidence adduced at trial, deciding that the prosecution had failed to meet its burden and that the proof was insufficient to support beyond a reasonable doubt the allegations of the indictment. Id. at 810-11. The prosecution was not allowed to appeal from this judgment

where success on appeal would require retrial. Id. at 811.

The United States Court of Appeals for the Ninth Circuit similarly refused to allow the prosecution to appeal a decision to grant a Rule 29(a) motion in United States v. Ember, 726 F. 2d 522 (9th Cir. 1984). After trial began, the trial court excluded several pieces of evidence that the government had offered to prove the defendant's guilt of narcotics charges. 726 F. 2d at 523. Following several of these rulings, the court ordered a close to the prosecution's case, suggested the defendant move for acquittal under Rule 29(a), and once the motion had been made, granted it. Id. at 523. Reviewing the entire record, the Ninth Circuit concluded that the trial court's action represented a resolution of the factual elements of the charged offenses, id. at 524: "[T]he district court evaluated the

government's evidence and determined that it was insufficient to sustain a conviction." The prosecution's complaint that this decision followed erroneous evidentiary rulings was to no avail; since a new trial would be required, the Double Jeopardy Claused barred the appeal. Id. at 525. See also United States v. Suarez, 505 F. 2d 166, 168 (2d Cir. 1974)(prosecution could not appeal judgment of acquittal granted after declaration of mistrial because of a hung jury when motion was made at conclusion of prosecution's case). The government is simply not allowed a second opportunity to present its factual case where a prosecution has been terminated because a court has concluded -- whether correctly or not -- that the prosecution failed to present sufficient evidence for conviction. Burks v. United States, supra.

Contrary to the state's view,

prosecution appeals following motions for judgment of acquittal under Rule 29, where retrials would be required, have been allowed not for all rulings based on "legal" grounds but rather only when the judgment of acquittal was made for reasons unrelated to the legal sufficiency of the evidence. As this Court held in Scott, which involved dismissal of two parts of an indictment for pre-indictment delay,

> [A] defendant is acquitted only when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some of all of the factual elements of the offense charged," Martin Linen, supra, 430 U.S. at 571. Where the court, before the jury returns a verdict, enters a judgment of acquittal pursuant to Fed. Rule Crim. Proc. 29, appeal will be barred only when "it is plain that the District Court...evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." 430 U.S. at 572.

Scott, 437 U.S. at 97.[11]

This case is precisely the case described in Scott, where retrial, and therefore this appeal, are barred by the double jeopardy clause. The defendants herein demurred to the Commonwealth's case, and the trial court sustained their motion on the ground that the Commonwealth had failed to present sufficient evidence to link the defendants to the criminal activity alleged. Zoller, 490 A. 2d 396. In essence, the trial court decided that the Commonwealth had failed to establish the defendants' guilt.

Like the insufficiency determinations of

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[11] See also Scott, 437 U.S. at 101 ("We now conclude that where the defendant himself seeks to have the prosecution terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the Government from his successful effort to do so is not barred by 18 U.S.C. §3731 (1976 ed.)." Here, the prosecution was terminated only after the defendant did, by demurrer, make a submission to the judge as to his guilt or innocence. The defendants could not have made their motion any earlier than they did: a demurrer may not be made before the close of the Commonwealth's evidence. See Pennsylvania Rule of Criminal Procedure 1124(a)(1).

Burks, Hudson, Martin Linen, and Sanabria, the demurrer here is an unappealable determination requiring discharge of a defendant. Its rendition required the trial court to perform one of the functions the jury must later face. Evidence of guilt must arise out of the prosecution's evidence. Commonwealth v. Garrett, 423 Pa. 8, 12, 222 A. 2d 902, 905 (1966); Commonwealth v. Bausewine, 354 Pa. 35, 41, 46 A. 2d 491, 493 (1966). If guilt is not established by the prosecution's evidence, it may not thereafter be deemed to be established by a general feeling that a defendant is not telling the truth about a given matter. Commonwealth v. Trafford, 312 Pa. Super. 578, 583, 459 A. 2d 373, 375 (1983). At the close of the evidence the trier of fact, be it the jury or the judge, makes an independent determination of whether the Commonwealth has presented enough evidence to establish the defendant's

guilt beyond a reasonable doubt. Commonwealth v. Tabb, 417 Pa. 13, 16, 207 A. 2d 884 (1965); Commonwealth v. Moore, 398 Pa. 198, 202, 157 A. 2d 65, 68 (1959). Although the jury or judge sitting as a jury may determine that the quality of evidence was insufficient to find a defendant guilty of a crime, it may also determine that the quantity was insufficient to convict. It may decide that no evidence at all was presented to support a determination that an essential element of an offense was existent. In deciding whether or not to grant a defendant's motion for a demurrer, a judge, even though he makes no credibility determinations and takes the prosecution evidence as true, is inescapably assessing and resolving correctly or not, some or all of the factual elements of the offense charged. Its grant, therefore, is the functional equivalent of an acquittal, and it

cannot be appealed where reversal would require retrial of the defendant.

A noted commentator on criminal procedure in Pennsylvania (and the chairman of the Committee for the Pennsylvania Rules of Criminal Procedure) correctly distilled the force of this Court's precedents when he wrote, "[T]he Pennsylvania distinction between demurrers after jeopardy has attached (held appealable in Pennsylvania) and acquittals (held not appealable in Pennsylvania) is not a viable distinction for purposes of federal double jeopardy." J. Strazzella, "Commonwealth Appeals and Double Jeopardy", 4 Pa. L.J. 11, 12 (1981). Any other ruling would require a wholesale overruling of recent cases and a massive departure from the policies repeatedly held to underly the rule against appeals from insufficiency acquittals.[12]

CONCLUSION

For the reasons set forth in this brief, the decision of the Pennsylvania Supreme Court should be reversed.

Respectfully submitted,

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December 1985

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[12] We note that several states have reached conclusions which are in accord with the above. See, e.g., State V. Whorton, 225 Kan. 251, 589 P. 2d 610, 613 (1979); State v. Shaw, 282 Md. 231, 383 A. 2d 1104, 1108 (1978); People v. Anderson, 409 Mich. 474, 295 N. W. 2d 482, 489-90 (1980); cert. denied, 449 U.S. 1101 (1981); State v. Greenwalt, 63 P. 2d 1178, 1181-82 (Mont. 1983); People v. Bro n, 40 N.Y. 2d 381, 386 N.Y.S. 2d 848, 856, 353 N.E. 2d 811, 817 (1976), cert. denied, 433 U.S. 913 (1977); In re Dowling, 98 Wash. 2d 542, 656 P. 2d 497, 500 (1983).

AMICUS CURIAE

BRIEF

NO. 85-227

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ERNEST SMALIS, ET AL.,
Petitioner,
V.
THE COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Writ of Certiorari to the
Pennsylvania Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, NATIONAL DISTRICT ATTORNEYS ASSOCIATION (JOINED BY THE LEGAL FOUNDATION OF AMERICA, GULF & GREAT PLAINS LEGAL FOUNDATION, AND AMERICANS FOR EFFECTIVE LAW ENFORCEMENT)

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THE COMMONWEALTH OF PENNSYLVANIA,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF

Come now the National District Attorneys Association, et al., and move this Court for leave to file the attached brief as amici curiae, and would show as follows:

1. Identity and Interest of Amici Curiae. The amici curiae are described as follows:

The National District Attorneys Association, Inc. ("NDAA") is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and amicus curiae activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in IRS regulations. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. LFA is located on the campus of, and shares certain personnel and activities with, the South Texas College of Law in Houston. In support of its goals, the Foundation's attorneys

have frequently appeared to represent it as amicus curiae in this Court, as well as in the lower courts.

Americans for Effective Law Enforcement, Inc. ("AELE") is a national not-for-profit citizens' organization interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their lives, liberties and property, within the framework of the various state and federal constitutions. AELE has previously appeared as amicus curiae more than 60 times in this Court.

Amicus Gulf & Great Plains Legal Foundation is a not-for-profit public interest legal foundation established in 1976. Its goals include the maintenance of a rational system of criminal justice, the preservation of the free enterprise system, and the protection of individual and constitutional rights. The Foundation has appeared as amicus curiae in a number of cases before this Court, including several cases relating to criminal and constitutional law.

2. Desirability of an Amicus Curiae Brief. The ability of the State to appeal is an important part of a sound system of criminal justice. This Court's decision of the case at bar will shape the contours of the State's ability to appeal in ways that are likely to go beyond the immediate dispute between the parties. Because its members litigate criminal cases on a daily basis, amicus National District Attorneys Association may be able to assist the Court in fully developing the issues.

3. Reasons for Believing that Existing Briefs May Not Present All Issues. NDAA is a national association, and its perspective is nationwide. Other amici joining in the brief have principal offices in different States. This brief concentrates on policy issues, including the values served by the State's ability to appeal and the absence of harm to constitutionally protected

values. Although Respondent is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.

4. Avoidance of Duplication. Counsel for amici curiae has reviewed the Petition for Certiorari and the Appendix and has conferred with counsel for Respondent in an effort to avoid unnecessary duplication. It is believed that this brief presents several issues that are not otherwise raised.

5. Consent of Parties or Requests Therefor. Counsel has requested consent of all parties. The Consent of Respondent has been received, and the consent of Petitioner Despina Smalis has been received. This Motion is necessary because, after repeated efforts by mail, Federal Express and telephone to obtain either grant or denial of consent from counsel for Petitioner Ernest Smalis, there has been no response from such counsel as of the time of the printing of this amicus brief.

For these reasons, amici curiae request that they be granted leave to file the attached amicus curiae brief.

Respectfully submitted,

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BRIEF OF AMICI CURIAE, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, THE LEGAL FOUNDATION OF AMERICA, GULF & GREAT PLAINS LEGAL FOUNDATION, AND AMERICANS FOR EFFECTIVE LAW ENFORCEMENT

INTEREST OF AMICI CURIAE

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SUMMARY OF ARGUMENT

Amici curiae will not duplicate the case law analysis that it is expected the Respondent Commonwealth of Pennsylvania will undertake, although we agree with that analysis. Instead, this brief concentrates upon issues of policy.

I.

The right of the state to appeal adverse rulings of law, including rulings upon demurrers in Pennsylvania and similar rulings elsewhere, is an important part of the procedural system. Such rulings are not factual acquittals; indeed, they often concern matters of evidence law, statutory interpretation, corroboration requirements, or similar issues remote from the ultimate question of guilt or innocence. Particularly in the instance of malignant and widespread crimes such as arson, in which conviction frequently depends upon circumstantial evidence, appellate supervision of rulings of law is needed to prevent great injustices

and lend the law clarity. Finally, appellate review is a salutary check upon the power of single trial judges, and it furnishes the only restraint upon the occasional judge who does not do his or her duty toward the people of the jurisdiction.

II.

Appeal, in the present situation, does not invade any of the interests protected by the multiple jeopardy clause. The clause is intended to prevent multiple punishment for the same offense, to prohibit abusive or harassing multiple prosecutions short of verdict, and to avoid retrial after an adverse verdict so that the state cannot obtain unfair advantage by multiple "bites at the apple." The first two concerns are not at issue here, because the defendants are not subject to multiple punishment and have not been harassed by multiple prosecutions short of verdict. Nor is the third concern at issue. A requirement that a purely legal decision, aborting prosecution without a ruling on the merits, must be reviewed by appellate judges, does not grant the prosecution any unfair advantage in the nature of multiple verdicts. Indeed, the absence of a right of government appeal could hurt defendants, because it would make trial judges more hesitant to grant potentially meritorious defense requests for demurrer-type rulings.

ARGUMENT AND AUTHORITIES

I. THE RIGHT OF THE GOVERNMENT TO APPEAL IS ESSENTIAL TO A SOUND SYSTEM OF CRIMINAL JUSTICE.

In the present case, the court did not decide whether the evidence proved the defendant guilty beyond a reasonable doubt. Instead, the trial court decided that it was not authorized to decide that question. There is a strong interest in a process that enhances the degree to which important questions of guilt or innocence are resolved by fair procedures on their merits, and the right of the state to appeal is an important part of such a process.

A. *The present case, together with its companion case of Commonwealth v. Zoller, illustrates the need for the right to appeal rulings on demurrers and similar procedural orders.*

In *Commonwealth v. Zoller*,[1] which was a companion to the case at bar in the court below, the appellate court actually held that the grant of the demurrer was erroneous. The evidence would, as a matter of law, have supported a conviction and sufficed as proof beyond a reasonable doubt. But that decision was never made, as a result of the grant of the demurrer.

Commonwealth v. Smalis[2] –the case that is presently before this Court—involves a crime that is nearly as horrifying as could be imagined. The Commonwealth's brief on intermediate appeal, which was not challenged in the quoted respects, tells how two young college students died as a result of a terrible arson-murder:[3]

> . . . The testimony revealed that unit 3 contained no windows, and that the two tenants occupying the unit were unable to escape. (TT-A 233-234) The body of Judith Ann Ross, age 22, was found lying partially submerged in a bathtub, buried beneath the rubble (TT-A 931-932); it was subsequently determined that Miss Ross died of asphyxiation due to inhalation of smoke and gas produced by the fire. The body of 31-year-old Dale Burton was discovered in the unit's living room (TT-A 926); a subsequent autopsy revealed that Mr. Burton died of carbon monoxide poisoning and extensive fourth degree burns which charred more than 95 percent of his body's surface. (TT-B 389, 398)

The proof that these deaths were caused by arson was overwhelming.[4] Defendant Ernest Smalis was actually convicted, upon a severed charge originally consolidated with this case, of another and separate arson.[4a] The Commonwealth must have taken its appeal, in part, on the basis of a firmly held conviction that it owed these two young murder victims an effort to obtain a decision on the merits concerning the cause of their deaths.

Indeed, arson often presents close questions of the legality of convictions based upon circumstantial evidence. The act of arson is seldom directly witnessed by nonparticipants. Vigorous prosecution of this crime (which is far more common in America than is generally supposed) therefore requires proof by clues combined with motives and circumstances. Desirable levels of prosecution of this malignant crime would be unattainable if such situations routinely terminated in procedural decisions by trial judges refusing to submit the evidence to the trier of fact, and if such decisions were unreviewable. Conversely, clear decisions at the appellate level of such questions would serve compelling interests.

B. *The State's right of appeal is important in the demurrer situation and in analogous contexts.*

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1 490 A.2d 394 (Pa. 1985).

2 480 A.2d 1046 (Superior Ct. Pa.), *rev'd*, 490 A.2d 394 (Pa. 1985).

3 Brief for Appellant at 14-15, *Commonwealth v. Smalis*, 480 A.2d 1046 (Superior Ct. Pa. 1984). These facts should be taken as established according to the cited record references for purposes of these proceedings, and in any event they were not challenged.

4 The cited brief indicates that a University of Pittsburgh night auditor saw two individuals enter and leave the building several times. About 45 minutes to an hour later, this witness saw a fireball explode from a window. (TT-A 513-537) The fire went to four alarms and was responded to by 24 pieces of firefighting equipment. (TT-A 678) The fire, which was extremely fast-moving, spread in part due to use of an accelerant. (TT-A 754-762) *Id.* at 12-14.

The fire was set in the early morning hours, when it was obvious tenants would be sleeping. *Id.*

4a *Commonwealth v. Smalis*, No. CC8001212, *aff'd*, 484 A.2d 813 (Superior Ct. Pa. 1984).

In Pennsylvania, a ruling of the trial court on a demurrer is a procedural ruling, not a factual ruling on the merits.[5] It prevents the trier of fact from ruling on the merits. If the trial is before a jury, it means that the judge terminates the trial and denies the jury the opportunity to consider whether the defendant is guilty beyond a reasonable doubt.

Often, that decision will be made on the basis of legal questions that not only fail to determine the merits, but do not relate at all to the question whether the evidence is factually sufficient to convict. An example may demonstrate this result. In Texas, conviction generally may not be had on the basis of the uncorroborated testimony of an accomplice witness.[6] Convictions in (for example) prosecutions for receiving stolen property were frequently terminated in the past in such cases, by rulings similar to a grant of a demurrer in Pennsylvania. Counsel of record on this brief once tried before a jury a case of receiving stolen property that involved the presentation of more than twenty-five witnesses; the case terminated in the trial court's ruling[7] that the corroboration requirement had not been met, and therefore, the jury could not consider whether the evidence proved the defendant guilty beyond a reasonable doubt, even though the evidence was clearly legally sufficient for that purpose.[8] Appeal was impossible because Texas permits the prosecution no appeal in any circumstance, including pretrial rulings.[9] This and similar rulings could not be tested before any decision-maker other than the single judges who had decided them. The Texas legislature later specifically reversed the corroboration requirement in such cases, and it is clear that the prosecution in question would be decided by a jury today.[10]

This illustration is only one example of the way in which rulings corresponding to Pennsylvania's demurrer ruling in this case can present questions that are not only not dispositive of the merits, but are completely unrelated to them. As another illustration, a trial judge in a vehicular homicide case may determine that the chemical intoxication test in evidence has not been properly admitted, so that a pure question of evidence law results in termination of the prosecution.[11] Or a judge may decide that stipulated actions by a defendant do not amount to a crime by reason of a pure question of statutory construction of the law of crimes (a decision that he recognizes may be contrary to one that

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5 *Commonwealth v. Williams*, 71 Pa. Super. 311 (1919); *Commonwealth v. Kerr*, 150 Pa. Super. 598, 29 A.2d 340 (1943); *Commonwealth v. Zoller*, 490 A.2d 394 (Pa. 1985) ("a demurrer is not a factual determination").

6 TEX. CODE CRIM. PROC. ANN. art. 38.14 (1964).

7 The ruling was by a procedure roughly equivalent to Pennsylvania's demurrer practice. Although termed an instructed verdict in Texas, the procedure does not involve either a verdict or a ruling on the merits.

8 *State v. Arrechea*, No. _____ (208th Dist. Ct. Harris County, Tex., 1975).

9 TEX. CONST. art. V, sec. 26.

10 TEX. PENAL CODE ANN. sec. 31.03(b)(2), (c)(2) (1974) (in cases of receiving stolen property, defendant's knowledge that property is stolen "may be established by the uncorroborated testimony of the accomplice").

11 Typically, results of chemical tests are admitted in evidence subject to proof, after admittance, of the evidentiary predicate. This procedure is followed because the predicate is surprisingly complex and usually depends upon the testimony of at least two witnesses. Recently, for example, a trial judge in Fort Bend County, Texas, held that intoxication evidence had been improperly admitted since documentary evidence of instrument certification by the statewide agency responsible for such certification had been offered in a form technically in noncompliance with rules of evidence. This holding meant that previously admitted intoxication evidence was technically inadmissible.

Such a ruling would lead to the sustaining of a demurrer (or similar ruling) in the absence of other evidence proving this element of the crime. Yet it would be based not on factual assessment of the evidence, but rather on technical rules of procedure.

an appellate court might render).[12] Or a court might determine that a statute shown to have been violated by a defendant is unconstitutional, and might grant a demurrer or make a similar procedural ruling.[12a] All such rulings would be subject to appellate disagreement, and none is a ruling on the facts of guilt or innocence that should give rise to a multiple jeopardy bar to appellate decision. Similarly, a ruling on a demurrer in a case such as the case at bar is a pure legal ruling, not a factual decision on the merits.

This Court, in fact, has had opportunities to review similar kinds of questions from courts of appeals, and has not considered the multiple jeopardy clause a bar. For example, in *Bell v. United States*,[13] a court of appeals panel had determined the evidence insufficient to convict the defendant, but this Court, following the opinion of an en banc court of appeals, later upheld the conviction. This Court's ruling was thus the reversal of a lower court's holding that was very similar in its effects to the sustaining of the demurrer in the present case. In a somewhat different but analogous situation, in *Albernaz v. United States*,[14] a lower court had held that, under the evidence presented, defendants could not be multiply convicted and sentenced, and it reversed certain dispositions below. There, too, this Court upheld the trial court's disposition, again in a ruling on a matter of law that reversed the intermediate panel's substantive determination in favor of the defendant. Finally, in a still different but analogous context, in *Wayte v. United States*,[15] the Court upheld a court of appeals' reversal of a trial judge's holding that the defendant had established facts constituting an absolute bar to his conviction.

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12 *See infra* note 13 and authority therein cited.

12a *See infra* note 15 and authority therein cited.

13 103 S.Ct. 2398 (1983).

14 450 U.S. 333 (1981). As in *Bell*, the Court actually upheld an en banc opinion reversing the panel's reversal.

15 105 S.Ct. 1524 (1985).

Each of these rulings is similar to the decision that an appellate court would make in reviewing a demurrer in Pennsylvania. Each concerns a pure question of law, but each reverses a lower court ruling that, if left undisturbed, would acquit the defendant. The legal system would be less suited to its purposes, however, without these kinds of decisions.

C. The State's right of appeal is a salutary check upon the legal decisions of a solitary trial judge.

In most instances in which demurrers or similar requests for rulings are presented to trial judges, the decisions that result are conscientiously made. There are rare judges, however, who do not perform their duties with an awareness of their obligations to the people of their states. In Houston, one judge was convicted of bribery with respect to dispositions of cases.[16] Shortly before his apprehension, the same trial judge had rendered a decision procedurally similar to Pennsylvania's demurrer in a controversial and vigorously tried case.[17] Such a ruling should be appealable. In Chicago, Operation Greylord continues to show that isolated similar cases can occur at any place in the United States. Abuses of authority are most prevalent when single judges exercise dispositive authority that need not be explained and when that authority is not subject to review by other judges whose shared decisionmaking might function as a corrective.

Even short of such rare instances of deliberate abuse, the sharing of decisions on legal issues that results from the state's right of appeal is salutary. Without it, judges who gauge their behavior by reversals would have strong (and quite correct) incentive to accede to defense requests, but they would lack any

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16 *State v. Bates*, 587 S.W.2d 121 (Tex. Crim. App. 1979). The judge was removed from office, but not until some time had passed after the offense. *In re Bates*, 555 S.W.2d 420 (Tex. 1977).

17 Interview with Michael Hinton, formerly Assistant District Attorney of Harris County [Houston], Texas, in Houston, January 21, 1986.

similar incentive to consider appropriate requests for rulings by the prosecution. When judges are immersed in a system in which all signals are in a single direction, as would be the case if defendants but not governments had the prospect of appeal, the probability of skewed influence upon judicial decisions increases. That result may be necessary as a consequence of the double jeopardy clause in some instances, such as in the case of factual acquittals based upon reasonable doubt; but the point is that the state's right of appeal is important enough so that it should not be curtailed unless there is real invasion of the interests protected by that constitutional provision.

II. APPEAL, IN THE PRESENT INSTANCE, DOES NOT INVADE THE INTERESTS PROTECTED BY THE MULTIPLE JEOPARDY CLAUSE.

In the preceding section of this brief, amici have sought to demonstrate the importance of the government's right to appeal. Amici recognize that the interest of the state in sound criminal procedures is not alone sufficient to sustain those procedures. Even such an interest must yield if it conflicts with the provisions of the Constitution. In this case, however, amici submit not only that the state's interest in the procedure is strong, but also that it does not invade the interests protected by the constitutional provision at issue.

As the court below indicated, the multiple jeopardy clause is an effort to protect three distinct interests of accused citizens.[18] First, it prevents multiple punishment for the same offense; secondly, it prohibits retrial after an adverse verdict so that the state is unable to obtain unfair advantage by multiple "bites at the apple;" and third, it secures the citizen against abusive or harassing multiple prosecutions short of verdict.[19] Since no

18 *Zoller*, 490 A.2d at 396.

19 *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

punishment has resulted in this case, and there is no prospect of multiple sentences, the first policy is not in issue. Furthermore, the interests protected by the second and third policies are not invaded by the Pennsylvania Supreme Court's decision here.

A. A requirement that a purely legal decision aborting prosecution without a ruling on the merits must be reviewed by appellate judges does not grant the prosecution the unfair advantage of multiple verdicts.

The decision below is to the effect that the purely legal question addressed by the trial judge must be addressed by the intermediate court of appeals. That legal question is whether conviction can be lawfully permitted to follow from the evidence adduced at trial. If the appellate court answers the question in the negative, the defendant's interests are clearly not invaded; the prosecution then is adjudged properly terminated and remains so, albeit not on the merits. If, on the other hand, the appellate court determines that conviction *could* lawfully be authorized, the trial court must submit to the trier of fact the issue whether there has been proof beyond a reasonable doubt. That issue has not been addressed yet, in the case at bar, at all.

These circumstances do not present the unfairness of multiple verdicts in which the prosecution repeatedly seeks to obtain the elusive conviction of a defendant initially acquitted. A continuous process, interrupted only by an appeal short of verdict, results. The real concern of the unfair-multiple-verdict policy is the enhanced possibility of conviction of the innocent that would result from multiple opportunities to have the evidence considered by different triers of fact,[20] but that opportunity is

20 This concern is "the possibility that even though innocent, [the accused] may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88 (1957). Since the present case does not involve multiple verdicts, the concern does not arise. *See also United States v. Scott*, 437 U.S. 82, 86 (1978) (policy of preventing "repeated attempts to convict").

not present at all under these circumstances.[20a]

In fact, a reversal of the Pennsylvania Supreme Court's decision could produce behavior by trial judges that would harm some defendants. If faced with the knowledge that their rulings on doubtful questions of law would terminate prosecutions that might be meritorious, without appellate review to determine the merits, trial judges might well be hesitant to make demurrer-type rulings, preferring instead to allow the trier of fact to decide the case and a reviewing court to determine the law. Such an approach would induce defendants to go forward with evidence they might otherwise never have to present and necessitate jury verdicts that defendants otherwise would not need to endure. The Pennsylvania Supreme Court's opinion avoids these disadvantages without subjecting defendants to multiple jeopardy.

B. The policy against abusive, harassing multiple prosecutions short of verdict is not violated by the appeal of a ruling precipitated by the defendant as a matter of trial strategy, through a defense motion.

It is to be emphasized that the defendants in the present case sought the ruling of the trial court in this case, as a matter of trial strategy.[21] That ruling, which they chose to seek, prevented the trier of fact from reaching the merits. If defendants had, instead, sought acquittal based upon the evidence, allowing the trier of fact to consider the evidence and determine whether it sufficed to prove them guilty beyond a reasonable doubt, their acquittal (if that result in fact was the outcome) would bar

20a The multiple jeopardy clause is "directed at the threat of multiple prosecutions, not at Government appeals . . . ." *United States v. Wilson*, 420 U.S. 332, 342 (1975).

21 "[T]he defendant *elected* to seek a demurrer . . . rather than the other options . . . ." 490 A.2d at 401 (emphasis added).

retrial.[22] The basing of the appeal on such a ruling, made in response to a *defense* request for termination other than on the merits, leaves the invocation of the appeal within the control of the defendant, and removes the possibility that appeal and continuation of the same prosecution could result in abuse or harassment.

Indeed, the present case contains less probability of abuse or harassment than does retrial after a mistrial based upon manifest necessity. Here, the prosecution does not have the opportunity to consider the present trier of fact as versus another and "better" jury that might result after mistrial. Likewise, the present case does not present the situation of defense counsel forced to forego a satisfactory present jury, and to move for mistrial, because of prosecution conduct decreasing the fairness of the trial. Nevertheless, such instances of manifest necessity have repeatedly been held to allow retrial without the bar of multiple jeopardy.[23] The ruling below, which is extremely unlikely to result in prosecution efforts to obtain termination and retrial, should be regarded as less abusive, and less conducive to possibilities of harassment, than cases of manifest necessity.

Finally, the possibility of harassment is reduced to the vanishing point by the requirement that the prosecution must prevail on appeal before it is entitled to a retrial. The state must have presented a case entitling it to consideration of conviction. The appeal must determine that this requirement, which is not interposed in cases of mistrial based upon manifest necessity, is satisfied. The prosecution could succeed in harassment only if it obtained the connivance of three appellate judges toward that end.

22 Pennsylvania law enables the defendant to choose between several procedures for the possible termination of the case favorably to defendant, several of which (unlike the demurrer at issue) call for rulings on the merits. *Id.*

23 *E.g., United States v. Scott*, 437 U.S. 82, 93-94 (1978).

CONCLUSION

The decision of the Pennsylvania Supreme Court should be affirmed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

No. 85-227

In the Supreme Court of the United States

OCTOBER TERM, 1985

DESPINA SMALIS AND ERNEST SMALIS, PETITIONERS

v.

COMMONWEALTH OF PENNSYLVANIA

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars the prosecution from appealing an order of the court sustaining a demurrer at the close of the prosecution's case on the basis of legal insufficiency of the evidence.

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INTEREST OF THE UNITED STATES

The question presented in this case involves the constitutionality of an appeal by the prosecution from the sustaining of demurrers by the trial court at the close of the prosecution's case, pursuant to Pennsylvania rules of criminal procedure. Rule 29 of the Federal Rules of Criminal Procedure provides a similar mechanism for pre-verdict judicial termination of a trial, and a significant number of federal prosecutions are terminated at this stage by the trial court's entry of a judgment of acquittal. The United States has a strong interest in being able to secure correction of legally erroneous pre-verdict terminations of criminal trials.

JURISDICTION

The United States believes that there is a serious question whether the Court has jurisdiction in this case. Certiorari was sought pursuant to 28 U.S.C. 1257(3), which

permits review by this Court only of "[f]inal judgments or decrees" of a state court. The decision of the Pennsylvania Supreme Court upholding the prosecution's right of appeal did not terminate this case, but rather remanded to the Superior Court for further proceedings, consisting of a determination of the merits of the Commonwealth's appeal. In the context of a criminal prosecution, finality is normally determined by the imposition of sentence (*Flynt* v. *Ohio*, 451 U.S. 619, 620 (1981)), and of course no conviction has been had, let alone sentence imposed, in the instant case.[1]

It is of course true that petitioners here assert a right to be free of allegedly impermissible double jeopardy and that appeals invoking such a right are treated as being from final orders under the "collateral order" doctrine. *Abney* v. *United States*, 431 U.S. 651 (1977). But that is true only because, in cases like *Abney*, a refusal to entertain an appeal could, if the double jeopardy claim were meritorious, lead to an irremediable violation of the defendant's constitutional right (and because the other elements of the collateral order doctrine are also held to be met in such an appeal). These principles would no doubt lead to the conclusion that a judgment remanding this case for further trial proceedings would exhibit the requisite finality to satisfy Section 1257 for purposes of presenting a double jeopardy claim to this Court.

But that is not what has happened here. Rather, the case has been remanded for further *appellate* proceedings. Petitioners do not assert—nor could they—that such proceedings would themselves violate double jeopardy constraints. But the consideration of the merits of the appeal by the Superior Court may well result in an affirm-

[1] This case does not have any of the characteristics that caused four Justices to dissent from the jurisdictional holding in *Flynt*. Those Justices believed that the conduct of the trial would itself violate the Constitution if Flynt's claim of impermissible selective prosecution to chill First Amendment rights were meritorious. See 451 U.S. at 623-624. Here, there can be no suggestion that consideration of the Commonwealth's appeal could itself violate federal rights of any kind.

ance of the trial court's ruling—thereby removing any possibility of injury to petitioners' double jeopardy rights by eliminating the prospect of further trial proceedings. If, on the other hand, the Superior Court reverses the grant of the demurrer and remands for continuation of the trial, and the Pennsylvania Supreme Court upholds that ruling, petitioners' claim will be ripe for this Court's review at that time. At present, however, the case is plainly in an interlocutory posture, and the petition should be dismissed for lack of jurisdiction.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

The law of double jeopardy is judge-made law, evolved by this Court in an effort to give content to the central idea embodied in the Double Jeopardy Clause of the Fifth Amendment that unjustified repetitive litigation of criminal charges should not be permitted. Among the principles that have achieved acceptance is that the prosecution may not seek appellate review of an "acquittal" if the result of a reversal on appeal would be a new trial. And the Court has generally assumed that this principle would extend to a legal ruling on the sufficiency of the evidence entered by the trial court. While this case can be affirmed on the ground that a successful prosecution appeal would result only in a continuation of the first jeopardy, rather than an impermissible second jeopardy, we believe that this case offers the Court an occasion to consider whether it should reexamine some of its assumptions about the status of rulings regarding legal sufficiency of the evidence.

A. It is of course beyond question that the process of criminal prosecution includes numerous procedural advantages for the defendant, most notably the extremely

[2] If this were a federal case, the lack of finality would not present a jurisdictional bar to review by certiorari under 28 U.S.C. 1254(1). Nonetheless, prudential considerations ordinarily would lead the Court to decline review of a case in this interlocutory posture. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967).

heavy burden of proof that the prosecution is required to shoulder. Each of these advantages is rationally rooted in the values of the criminal justice system, particularly the allocation of the risk of error to minimize the danger of convicting an innocent person. The advantage involved in this case—the defendant's ability to retain the benefit of a legally erroneous "acquittal" that he has induced the trial court (not acting as ultimate fact-finder) to enter—has no comparable rational nexus to the policies of the criminal law. None of the policies that have been put forth by this Court to justify the "special weight" accorded to jury acquittals has any applicability to such a legal ruling.

Thus, any sensible balancing of the relevant double jeopardy interests compels the conclusion that the prosecution should not be barred from appealing a midtrial termination sought by the defendant on the grounds of legal insufficiency of the evidence. A contrary rule imposes substantial costs on society without advancing any double jeopardy interest of the defendant. As was explained in *United States* v. *Scott*, 437 U.S. 82 (1978), the relevant interest protected by the rule restricting retrials in cases of pre-verdict termination of the first trial is the "valued right" to have the trial completed before the original tribunal. A defendant voluntarily relinquishes that right by a motion for mistrial (see *United States* v. *Dinitz*, 424 U.S. 600 (1976)) or by a request that the trial be terminated prior to verdict on some other ground, such as the claim in *Scott* that there had been impermissible preindictment delay. Double jeopardy principles do not bar the retrial that would follow a successful government appeal in such a case because the need for a retrial has been occasioned by the defendant's election to terminate the first trial prior to verdict rather than deferring his claim for post-verdict consideration.

While *Scott* stated, without separately analyzing the matter, that acquittals are different and are excepted from this principle, it is difficult to construct a persuasive

basis for such a conclusion in the case of "acquittals" by the court attacked solely for legal error.[3] As with the claim in *Scott*, the assertion that the evidence is legally insufficient to support a guilty verdict is available as a ground for post-verdict relief. And if a post-guilty-verdict acquittal is entered, the prosecution can appeal and secure a determination of the legal sufficiency of the evidence without the necessity for a retrial and therefore without raising any double jeopardy problem (see *United States* v. *DiFrancesco*, 449 U.S. 117, 130 (1980)). It is solely the defendant's action in seeking pre-verdict termination by entry of the court's ruling in advance of the factfinder's consideration of the evidence that attaches the added price of retrial to the cost of correcting any error in the defendant's favor that may have been made by the trial court. (The different types of legal error that can fall under the rubric of an "acquittal" by the court are discussed at note 17, *infra*.)

In sum, we submit that a rule applying to legally erroneous rulings of insufficiency by the court the special status accorded to legally erroneous acquittals by the factfinder cannot be squared with any reasonably even-handed concept of justice. In these situations, it is the

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[3] We do not speak here of paradigmatic acquittals, viz., verdicts of not guilty returned by the factfinder on the basis of the application of the law to the facts found upon consideration of the evidence. Even then, there is much to commend Justice Cardozo's sentiment that it is more just to allow a retrial when the original verdict is tainted by material legal error than to prohibit review and correction. *Palko* v. *Connecticut*, 302 U.S. 319, 328 (1937). But at least in those cases it is possible that the verdict was actually the product of a *factual* determination that the prosecution had failed to establish guilt. In a case in which a judge enters a pre-verdict "acquittal" (or, as here, withholds factfinding in a bench trial in order to rule on purely legal grounds), on the other hand, there has been no such factual determination, only a legal ruling. When that ruling is found to be legally erroneous, we can be certain that there has as yet been no failure by the prosecution to demonstrate guilt by legally sufficient evidence—and therefore no legally tenable basis for holding the proceedings to have produced an unreviewable acquittal.

defendant who has procured the early termination of the trial despite the prosecution's efforts to secure a verdict. Is it right to allow him to complain that he should not be subjected to the retrial that his own action has necessitated? See *Oregon* v. *Kennedy*, 456 U.S. 667, 673 (1982). And if the defendant has led the trial court into error, to the prejudice of the prosecution, it hardly seems just to bar the prosecution, as the injured party, from securing relief. Application of such a rule compromises the fairness of the criminal justice system by allowing guilty defendants to go free without perceptibly advancing any of the policies embodied in the Double Jeopardy Clause.

B. In any event, even if the court's order here is treated as an "acquittal," there is no bar to appeal because further proceedings in the trial court would be a continuation of the first trial and therefore not a "second jeopardy," to which alone the constitutional prohibition applies. There is no reason why a defendant should go free just because a court finds the evidence insufficient in midtrial, if the court reconsiders its ruling or is reversed on appeal prior to the discharge of the jury. The Double Jeopardy Clause does not protect against a single trial, and it is not implicated if a court recesses and then resumes a trial. That fact does not change simply because there is appellate consideration of a legal issue during the recess, and therefore the resumption of trial here after the court's recess would still be part of the first trial. Finally, it is well established that the defendant has no right to retain the benefit of an erroneous judicial finding of insufficiency since a post-guilty-verdict "acquittal" by the court is appealable.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT PROHIBIT APPEAL IN THIS CASE

A. The Double Jeopardy Clause Does Not Bar A Retrial Following Appeal Of A Midtrial Order By The Court Erroneously Terminating A Prosecution On The Ground That The Evidence Is Legally Insufficient

1. *The Double Jeopardy Clause Has Been Held To Bar Retrial for the Same Offense Following an Acquittal by the Factfinder*

In *Kepner* v. *United States*, 195 U.S. 100 (1904), this Court rejected the theory of "continuing jeopardy" propounded in dissent by Justice Holmes and held that an acquittal by the factfinder could not be appealed, even if it was erroneous, if the appeal constituted or would result in a retrial. In *United States* v. *Wilson*, 420 U.S. 332, 351-352 (1975), the Court affirmed in dictum that the holding of *Kepner* is rooted in the Double Jeopardy Clause and that it applies to an ordinary appeal on the basis of legal error following a verdict of acquittal if a successful appeal would necessitate a retrial.[4] Although the rule that a verdict of acquittal, even if erroneous, insulates a defendant against a retrial has come to be considered a fundamental principle of double jeopardy law, *United States* v. *Scott*, 437 U.S. 82, 90 (1978), it is worth recalling that in *Palko* v. *Connecticut*, 302 U.S. 319, 323, 329 (1937), the Court found that this result is not compelled by—indeed, is not even particularly consistent with—any basic notions of fairness or due process.

The rule insulating erroneous acquittals from correction has been described as "implausible on its face" (Westen & Drubel, *Toward a General Theory of Double*

[4] The decision in *Kepner* involved a peculiar procedure in the Philippines that essentially contemplated a trial de novo on appeal following the entry of a verdict of acquittal in a bench trial. In addition, the case technically did not involve the Double Jeopardy Clause, but rather a federal statute applying double jeopardy principles to the Philippines. See *Wilson*, 420 U.S. at 346 & n.15.

Jeopardy, 1978 Sup. Ct. Rev. 81, 123), and it imposes substantial costs on the fairness of the criminal justice system. As the Court has noted, it permits "the release of some defendants who have benefited from instructions or evidentiary rulings that are unduly favorable to them." *Wilson*, 420 U.S. at 352. In some cases, these defendants may be clearly guilty of grave crimes, and in almost all these cases the error at trial is not the fault of the prosecutor but rather has been committed by the trial court at the instigation of the defense.[5] Thus, in cases where a verdict of acquittal results from a legal error, the effect of the "special weight" accorded acquittals (see *United States* v. *DiFrancesco*, 449 U.S. 117, 129 (1980)) is to deny the government its "one full and fair opportunity" to litigate the question of the guilt of the accused (see *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978)); the result is often a windfall for a guilty defendant.[6]

[5] Indeed, the rule introduces a genuine anomaly into the criminal justice system. If a defendant is tried and, following a trial error committed at the behest of the prosecution (such as an erroneous instruction), is convicted, the Double Jeopardy Clause does not protect him from being subjected to a second trial following a successful appeal. *United States* v. *Tateo*, 377 U.S. 463, 465-466 (1964); *United States* v. *Ball*, 163 U.S. 662 (1896). This is so even though the tainted first trial cannot be said to have impaired the presumption of innocence and the error at the trial was not the fault of the defendant. On the other hand, a defendant who is acquitted because of a trial error can never be retried. This is so even though the tainted trial does not indicate that the prosecution cannot prove the defendant's guilt in a fair trial and even though the error at trial may have been and probably was made at the behest of the defendant. Thus, the defendant who is less "blameworthy" with respect to the defect in the original trial may be subjected to the ordeal of a second trial, although there is no objective basis for concluding that he is any more likely to be guilty than the defendant who has been acquitted at a trial that he managed to infect with error. See generally Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Mich. L. Rev. 1001, 1009, 1011-1012 (1980).

[6] The anomalous results that can be occasioned by this rule are illustrated by a case presently before this Court involving the

The judgment necessarily underlying the special protection of erroneous acquittals is that the double jeopardy policies advanced by this rule outweigh its negative ef-

application of the Double Jeopardy Clause to capital sentencing hearings. In *Poland* v. *Arizona*, cert. granted, No. 85-5023 (Oct. 7, 1985), the defendants were charged in a trial-type sentencing hearing with being subject to the death penalty under two distinct theories—murder committed "in expectation of the receipt of anything of pecuniary value" or murder committed in an "especially heinous, cruel or depraved manner." At the hearing, the defendants were found subject to the death penalty on the ground that the murder was committed in a cruel manner, but the judge held that, as a matter of law, the defendants could not be found guilty under the pecuniary gain theory because he believed that the statute applied only to murders-for-hire. The death sentence was vacated on appeal on the ground that there was insufficient evidence to show that the murders were committed in a cruel or depraved manner. In the interim, however, the Supreme Court of Arizona had made clear that the trial court's original interpretation of the statute was erroneous and that the pecuniary gain provision did cover murder in the course of a robbery, which was what was involved in *Poland*. On appeal from the entry of a death sentence again on remand, the Arizona Supreme Court held that the Double Jeopardy Clause did not bar the imposition of the death penalty on the pecuniary gain theory. 144 Ariz. 388, 404, 698 P.2d 183, 198-199 (1985).

We are aware of nothing in existing double jeopardy principles that would support any different conclusion. The defendants' first sentencing hearing resulted in a death sentence (*i.e.*, a "conviction"), and therefore there was no bar to a second proceeding on remand. And the State had put forth the pecuniary gain theory at the first proceeding and had adduced sufficient evidence at that hearing to justify imposition of the death penalty. Since there was no failure of proof, and an "acquittal" (*i.e.*, denial of the request for the death penalty) neither was nor should have been entered at the first sentencing proceeding, the principles of *Burks* v. *United States*, 437 U.S. 1 (1978), have no application.

The correct result in *Poland* does seem anomalous, however, when compared with *Arizona* v. *Rumsey*, No. 83-226 (May 29, 1984). In *Rumsey*, the State sought the death penalty only on the pecuniary gain theory, and it was rejected by the trial court, hearing the case without a jury, on the basis of the same erroneous interpretation of the statute made in *Poland*. In *Rumsey*, however, this Court held that the Double Jeopardy Clause prevented Rumsey from being subjected to a second sentencing proceeding in which the statute would be correctly applied because he had been "acquitted" at the first

fects. Although it has never treated the matter extensively, the Court has adverted on several occasions to these policies. In *Wilson*, the Court noted that appeal of acquittals would "allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to reexamine the weaknesses in his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal." 420 U.S. at 352 (footnote omitted). More generally, the Court has concluded that "[t]o permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'" *United States* v. *Scott*, 437 U.S. at 91, quoting *Green* v.

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proceeding. See slip op. 7-8. The only difference between *Poland* and *Rumsey* is that the defendants in *Poland* had been "convicted" at their first sentencing proceeding (on an erroneous theory) and Rumsey had been erroneously "acquitted." See *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 307 (1984) ("The conceptual difficulty for Lydon is that he has not been acquitted."). Logically, this fact does not suggest that they should be treated differently with respect to whether they can be subjected to a second sentencing hearing; why should the *Poland* defendants be worse off because they were charged and convicted on an erroneous theory?

The answer is that while logic and policy call for the two cases to be treated the same, *Rumsey* involves the special rule for acquittals, which may insulate defendants in cases where logic does not suggest that they are being treated unfairly. Because the defendants in both cases were guilty of committing murder for pecuniary gain—and the State proved that at the first proceeding in both cases—there would appear to be nothing unfair or unconstitutional in subjecting the defendants in both cases to the death penalty on the basis of the pecuniary gain theory; that would have been the result at the first proceeding but for the legal error in the defendants' favor. The different result in these two cases amounts to a windfall for Rumsey, and it is solely attributable to the special, somewhat anomalous, treatment that has been accorded acquittals under the Double Jeopardy Clause.

United States, 355 U.S. 184, 188 (1957).[7] A noted commentator, finding these and other suggested rationales unpersuasive, has concluded that the rule is designed to preserve the jury's right to "acquit against the evidence." Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Mich. L. Rev. 1001, 1012-1023 (1980); see *United States* v. *DiFrancesco*, 449 U.S. at 130 n.11.[8] We mention this matter not for the purpose of asking reconsideration of the settled rule insulating a verdict of acquittal by the finder of fact from prosecution efforts to secure a retrial, but because we believe it sheds light on the question whether the Court should confirm the extension of this principle to the quite different setting of judicial rulings on purely legal questions, which we now proceed to consider.

2. *A Ruling by the Court that the Evidence is Legally Insufficient to Sustain a Guilty Verdict is not a Verdict of Acquittal that Automatically Bars a Retrial*

a. The rule that a verdict of acquittal is an absolute bar to a retrial does not answer the question presented here. This case does not involve a verdict of acquittal entered by the factfinder; it involves the sustaining of demurrers by the court, which entails a legal determination that the evidence is insufficient to support a guilty ver-

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[7] We suggest that such an analysis proves too much, since it is equally applicable to retrials of defendants whose *convictions* at their first trials were infected by prejudicial error—a practice of undoubted validity.

[8] Professor Westen's jury nullification rationale seems to us subject to much the same criticism he directs at other rationales, viz., that the decision to nullify (if that is indeed what underlay the verdict) is also likely to have been tainted by any errors the court made in excluding prosecution evidence or misinstructing the jury on material points of law.

dict.[9] It is well settled that such a ruling is reviewable on appeal if entered after verdict, since in such a case reversal would not necessitate a retrial (see *United States* v. *DiFrancesco*, 449 U.S. at 130; *United States* v. *Jenkins*, 420 U.S. 358, 365 (1975); *United States* v. *Singleton*, 702 F.2d 1159, 1161 n.8 (D.C. Cir. 1983) (collecting cases)). The standard of review of a Rule 29 (Fed. R. Crim. P.) acquittal is the same as for any other legal ruling; no deference is paid to the trial court's assessment of the evidence, though that would be appropriate if it were a factual determination. See, *e.g.*, *United States* v. *Singleton*, 702 F.2d at 1161-1163; *United States* v. *Steed*, 674 F.2d 284, 286 (4th Cir. 1982) (en banc).

We submit that there is no reason in law or policy why the government should automatically be barred from appealing an erroneous legal ruling of insufficiency even if it is made prior to verdict. That is, we contend that a court's legal conclusion that the evidence is insufficient, although labeled an "acquittal" in Rule 29, is not in constitutional analysis the kind of true "acquittal" entitled to the special weight accorded to the factfinder's determination of innocence; rather, the judicial decision to take the case away from the factfinder should be reviewable on appeal to the same extent as other legal errors, even if correction of an erroneous ruling would necessitate a retrial.

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[9] It is not material to this argument that this case involves a bench trial, so that the ruling sustaining the demurrers in fact was entered by the entity also responsible to act as factfinder. A demurrer is a motion addressed to the presiding court attacking the legal sufficiency of the evidence. None of the courts below have doubted that the court here did not act in its capacity as a factfinder, but rather entered a legal ruling. Indeed, the trial judge clearly viewed his ruling as purely a legal determination, since he stayed the trial in order to permit the appeal; if the judge had intended to acquit the defendants in his capacity as factfinder (and under state law he had no authority to do that at the close of the prosecution's case), he would not have recognized the Commonwealth's right to appeal. Therefore, for double jeopardy purposes, the question of the appealability of the order sustaining the demurrers in this case is the same as if this were a jury trial.

At the outset, it is important to emphasize that the double jeopardy issue arises in this context only when the trial court has erred and the defendant has received an unjustified termination of the trial in his favor; if the trial court's ruling is correct, it will be affirmed on appeal and there will be no occasion for the further proceedings in the trial court that implicate the Double Jeopardy Clause. The question then is whether there is a double jeopardy policy that is sufficiently weighty to justify making such errors unappealable, thereby conferring a windfall acquittal on the defendant; we submit that there is no double jeopardy interest of the defendant implicated in this context at all, much less one that would justify such an untoward result.

The Double Jeopardy Clause involves a balancing of the interests of defendants against those of society in seeing that the criminal justice system operates rationally and that the guilty are brought to justice. See *United States* v. *Scott*, 437 U.S. at 92; *United States* v. *Tateo*, 377 U.S. 463, 466 (1964). One of the important interests of the defendant is his "'valued right to have his trial completed by a particular tribunal'" (*United States* v. *Dinitz*, 424 U.S. 600, 606 (1976), quoting *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949)); somewhat akin to that is the government's right to a "complete opportunity to convict those who have violated its laws" (*Arizona* v. *Washington*, 434 U.S. 497, 509 (1978)). When a trial proceeds to verdict in the ordinary course, both the defendant and the prosecution have received their opportunity to obtain the judgment of the designated factfinder. If the defendant is dissatisfied with that judgment he may seek to have it overturned on the ground that it is based on legal error. If the prosecution is dissatisfied with the judgment, it does not have the same option. The double jeopardy interests identified in the preceding section are deemed to outweigh the prosecution's interests in an error-free opportunity to convict.

This relatively straightforward scheme is disrupted when the trial is terminated before the factfinder has

an opportunity to enter a verdict. The defendant has not had his trial completed by a particular tribunal; if his trial is to be completed now, he will have to be subjected to a second jeopardy, which raises a question under the Double Jeopardy Clause. On the other hand, if the defendant is not subjected to a retrial despite the erroneous and premature termination of his first trial, the prosecution will have been denied its one complete opportunity to convict him.

In balancing the relevant double jeopardy interests in such cases, the Court has placed great importance on whether the termination of the first trial was at the instance of the defendant or against his will. When the first trial ends in a mistrial (a neutral conclusion), the basic governing principles have long been settled and the constitutionality of a retrial turns almost entirely on this factor. If the defendant has moved for a mistrial, he can always be retried except in the very rare case in which the mistrial was deliberately provoked by prosecutorial misconduct (in which case it is not really the result of a choice by the defendant). See generally *Oregon* v. *Kennedy*, 456 U.S. 667 (1982). If the mistrial is granted over the defendant's objection, however, a retrial is barred by the Double Jeopardy Clause unless the decision to grant a mistrial was due to "manifest necessity"—a burden that is satisfied if there is a hung jury but otherwise can be a fairly difficult one to carry. See *Arizona* v. *Washington*, *supra*; *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824).[10]

[10] Like the rule giving special finality to acquittals, this rule carries with it the potential cost that guilty defendants will go free despite the absence of any error attributable to the prosecution. See, *e.g.*, *United States* v. *Jorn*, 400 U.S. 470 (1971); *United States* v. *Sartori*, 730 F.2d 973 (4th Cir. 1984) (mistrial declared because of trial judge's decision to recuse himself because of strong personal reaction to evidence of defendant's misdeeds held not based on "manifest necessity" and hence retrial barred). In these circumstances, the defendant's double jeopardy interest in a complete first trial is deemed to outweigh society's interest in bringing the guilty to justice.

The Court has only recently had to grapple with the situation where the trial is terminated prematurely by a ruling in favor of the defendant, rather than by the declaration of a mistrial.[11] The question of a retrial in such a case arises only if the ruling is tainted by legal error and the prosecution succeeds in having it overturned on appeal. Thus, with rare exceptions, this general issue did not arise until the Double Jeopardy Clause was applied to the states in 1969 and the federal statute governing prosecution appeals (18 U.S.C. 3731) was expanded in 1970 to give the government the right to appeal from rulings in favor of the defendant to the extent not barred by the Double Jeopardy Clause. The Court's first response to this issue was to set forth a categorical rule that an order terminating a trial in favor of a defendant can never be appealed if reversal on appeal would necessitate a retrial. *United States* v. *Jenkins*, 420 U.S. at 369-370. As more experience with government appeals in criminal cases accumulated, however, the Court reconsidered the balance of double jeopardy interests it had made in promulgating this categorical rule. In *United States* v. *Scott*, *supra*, the Court overruled *Jenkins* and held that whether the premature termination of the trial is at the defendant's behest or is forced upon him is of crucial importance in this context, as it is in the mistrial context.

In *Scott*, the defendant sought and was granted dismissal of the indictment in the middle of his trial on the ground of preindictment delay. The Court held that the Double Jeopardy Clause did not bar an appeal of this order or the retrial that would result from reversal. The Court explained that the double jeopardy principle protecting defendants against repeated attempts to convict them could not "be expanded to include situations in which the defendant is responsible for the second

[11] A trial may not be terminated prematurely in favor of the prosecution. See *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977); *Sparf & Hansen* v. *United States*, 156 U.S. 51, 105 (1895).

prosecution" (437 U.S. at 95-96). Instead, the Court equated the defendant's motion with a motion for a mistrial, which "is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact" (*id.* at 93). The Court concluded that "the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice" (*id.* at 99).

In our view, the rationale of *Scott* compels the conclusion that the appeal in this case does not violate the Double Jeopardy Clause. As in *Scott*, the defendants here have "not been 'deprived' of [their] valued right to go to the first [tribunal]; only the public has been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws'" (437 U.S. at 100, quoting *Arizona* v. *Washington*, 434 U.S. at 509). Here, the prosecution "was quite willing to continue with [the trial] to show the defendant guilty before the jury first empaneled to try him, but the defendant elected to seek termination of the trial," which is "a far cry" from the situation where a defendant has been acquitted at the close of trial (see 437 U.S. at 96). Under *Scott*, appeal here can be barred only if the court's action sustaining the demurrer is considered an "acquittal" and accorded the special weight that the Double Jeopardy Clause assigns to verdicts of acquittal, even if erroneous. We submit that neither logic nor the policies of the Double Jeopardy Clause identified by this Court support treating the order entered here the same as a jury's verdict of acquittal.

When the defendant has voluntarily elected to seek premature termination of his trial on the ground of evidentiary insufficiency, a retrial does not implicate the double jeopardy concerns that have been identified at justifying the special treatment of acquittals (see pages 10-11, *supra*). A second trial would not "allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first" (*Wilson*, 420 U.S. at 352) because the defendant's own action

has prevented the prosecutor's case from reaching the first trier of fact. Nor does a second trial present any risk that the prosecution will "wear down" the defendant (*United States* v. *Scott*, 437 U.S. at 91) when the first trial was aborted before it reached the factfinding stage. The defendant is not being forced to "'run the gantlet' a second time" (*Ashe* v. *Swenson*, 397 U.S. 436, 446 (1970), quoting *Green* v. *United States*, 355 U.S. at 190) because, in contrast to the case where there has been a true acquittal by the factfinder, he has taken action to terminate the trial before it is turned over to the factfinder and therefore before he has been exposed to any genuine risk of conviction. Cf. *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 310 (1984) (noting that defendant in "jeopardy" only in technical sense when virtually nothing harmful can happen to him at his first-tier trial). And, of course, to the extent the special treatment of acquittals rests on the jury's power to "'acquit against the evidence'" (*United States* v. *DiFrancesco*, 449 U.S. at 130 n.11), it has no application to a legal ruling by the court that must be based on the evidence and applicable law.

Indeed, the Court has already recognized that a judicial ruling of evidentiary insufficiency is substantially different for double jeopardy purposes from a verdict of acquittal. A post-verdict finding of insufficiency by the court is appealable just like a post-verdict dismissal on preindictment delay grounds (compare *United States* v. *DiFrancesco*, 449 U.S. at 130, with *United States* v. *Wilson*, *supra*), although an acquittal by the factfinder would not be appealable. There is no reason why a midtrial termination, at the defendant's behest, on grounds of legal insufficiency should not similarly be treated like a dismissal on other legal grounds and be held appealable (see *United States* v. *Scott*, *supra*). See generally Westen, *supra*, 78 Mich. L. Rev. at 1020-1021.

A rule granting absolute finality to midtrial judicial rulings of legal insufficiency carries with it substantial costs for our criminal justice system. Under Fed. R. Crim. P. 29, numerous prosecutions are terminated by

the court before verdict, some of them on plainly erroneous grounds that have been held to be unappealable because of the Double Jeopardy Clause. See, *e.g.*, *United States* v. *Giampa*, 758 F.2d 928, 934-935 (3d Cir. 1985); *United States* v. *Ellison*, 684 F.2d 664, 666, vacated, 722 F.2d 595 (10th Cir. 1982); see also Pet. App. A4; *United States* v. *Ember*, 726 F.2d 522, 523-524 & n.4 (9th Cir. 1984) (ambiguous ruling in bench trial before prosecution had completed presentation of its evidence held to be unappealable acquittal). Indeed, the rule creates a mechanism under which trial judges can deliberately insulate from judicial review legal rulings that would be reviewable if made at another time. See *Ellison*, 684 F.2d at 666 (noting that in recent prior case court of appeals had reversed post-verdict acquittal by same judge); *United States* v. *Appawoo*, 553 F.2d 1242, 1246-1247 (10th Cir. 1977) (judge informed lawyer that he would be guilty of "poor legal representation" if he made motion to dismiss before attachment of jeopardy because a pre-jeopardy ruling could be appealed).

While it may be necessary, because of the double jeopardy policies identified above, to live with some miscarriages of justice when a genuine acquittal is entered by the factfinder, there is no reason to do so when the defendant himself voluntarily has chosen to terminate the trial prematurely. As the Court has noted in the mistrial context, "it may be wondered as a matter of original inquiry why the defendant's election to terminate the first trial by his own motion should not be deemed a renunciation of that right [to have his trial completed before the first factfinder] for all purposes." *Oregon* v. *Kennedy*, 456 U.S. at 673. In that context, there is a logical—and quite limited—exception to this proposition when the mistrial is intentionally provoked by the prosecution. But here there simply is no relevant double jeopardy interest to be protected that warrants an exception. The defendant has not been deprived of his valued right to present his case to the first factfinder; he has abandoned that right for reasons that seem appropriate to him.[12] When the grounds for the midtrial ruling in his favor turn out to be erroneous, there is no reason to confer a windfall upon him instead of requiring him to undergo one full trial. A contrary rule "would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed." *Wade* v. *Hunter*, 336 U.S. at 688-689.

b. We recognize that our submission above diverges from the definitions of acquittal that this Court has put forth on several occasions. Even in *Scott*, whose analysis and holding strongly support our position, the Court distinguished between the preindictment delay ruling involved there, which was collateral to guilt or innocence, and a ruling that plainly indicates that the trial court "'evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction'" (437 U.S. at 97, quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977)). If this definition of acquittal is applied here, there is no doubt that the appeal would be barred because the trial court's decision represented a finding that the prosecution had failed to prove petitioners' guilt on the offenses as to which the demurrers were sustained.

It is our submission that this definition of acquittal is unduly expansive and that the policies that support giving special weight to acquittals extend only to determinations of not guilty by the factfinder. As a general rule, this more restrictive definition is fully consistent with the

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[12] We do not suggest that the defendant should be precluded from seeking a midtrial termination on grounds of evidentiary insufficiency. He may have good reasons for doing so and should not be forced to continue with a trial that may be unnecessary. But when a defendant seeks and obtains such relief it is not unreasonable to hold that he has assumed the risk of a retrial if it turns out that he was not entitled to prevail. See *Scott*, 437 U.S. at 100 n.13. We reiterate that, under the rule we propose, the defendant runs no risk of retrial by seeking any relief in the middle of trial unless in fact he is not entitled to that relief.

holdings of the Court in those cases in which the Court has indicated that a judicial determination of insufficiency is an acquittal; as in *Scott*, the statement that a judicial finding of insufficiency is an "acquittal" is dictum. For example, in *Tibbs* v. *Florida*, 457 U.S. 31, 41 (1982), the Court stated that a finding of not guilty by the trial judge "absolutely shields the defendant from retrial" to the same extent as a jury acquittal. *Tibbs* involved, however, the application of the rule of *Burks* v. *United States*, 437 U.S. 1 (1978), which concerns the impact of a legally valid finding of insufficiency on the state's ability to conduct a retrial. See also *Richardson* v. *United States*, No. 82-2113 (June 29, 1984), slip op. 9 n.5; *Hudson* v. *Louisiana*, 450 U.S. 40 (1981). *Burks* simply holds that the prosecution is not permitted a second opportunity to prove its case when an appellate court has found correctly that it has had one full and fair opportunity to do so and has failed; *Burks* does not suggest that an erroneous judicial finding of not guilty is not subject to correction.[13] Indeed, the Court's later discussion in *Tibbs* makes it clear that it was focusing on the situation where the evidence was *correctly* held to be insufficient. See 457 U.S. at 42.

Moreover, the Court's statements on this point have not been completely uniform. In *Arizona* v. *Rumsey*, No. 83-226 (May 29, 1984), slip op. 7, 8, the Court defined an acquittal that bars a retrial as one made by the "sole decisionmaker," suggesting that a legal finding of insufficiency by the judge in a jury trial would not be considered an acquittal. See also *Tibbs* v. *Florida*, 457 U.S. at 49 (White, J., dissenting) (suggesting that "acquittals" are entered by the factfinder). Indeed, the Court's

[13] We emphasize that the rule that we propose here is fully consistent with *Burks*. When either the trial court or the appellate court *correctly* held the evidence insufficient at the first trial, double jeopardy aspects of double jeopardy bar the prosecution from a *second* bite at the apple. But when the trial court, at the defendant's behest, has made an *erroneous* determination of insufficiency, there is no reason to deny the prosecution *one* opportunity to prove its case.

statements regarding the special status of acquittals have been read by one leading commentator to apply only to jury verdicts of not guilty. See Westen, *supra*, 78 Mich. L. Rev. at 1021-1023, 1034 n.99. Be that as it may, we suggest that the various dicta setting forth a more expansive definition of acquittals should not foreclose consideration of a narrower definition in this case, where the result may turn on the scope of that definition.

The idea that a judicial finding of insufficiency is not appealable if it would necessitate a retrial is not grounded solely in dictum, for there is one decision of this Court whose holding is inconsistent with our submission here. In *United States* v. *Martin Linen Supply Co.*, *supra*, the first trial of the defendants ended in a hung jury. The court thereafter granted the defendants' timely filed Rule 29(c) motion for a judgment of acquittal. This Court held that this ruling could not be appealed consistent with the Double Jeopardy Clause because a retrial would be required, even though, in the absence of the court's order, there would have been no bar to a second trial following a hung jury. The Court's decision rested on the premise that a judicial finding of insufficient evidence, even if erroneous, was entitled to the same special protection as an acquittal. 430 U.S. at 572-575. We submit that it is appropriate for the Court to reconsider *Martin Linen* here.[14]

[14] We do not regard either *Sanabria* v. *United States*, 437 U.S. 54 (1978), or *Fong Foo* v. *United States*, 369 U.S. 141 (1962), on which the Court in *Martin Linen* relied heavily (see 430 U.S. at 573-574), as inconsistent with the rule we propose here. In *Sanabria*, the trial court had rejected one of the two theories under which the prosecution was proceeding and suppressed all evidence pertaining to that theory; that done, it correctly concluded that the remaining evidence was insufficient to convict Sanabria of the charged offense. Because of a statutory bar to review of the ruling suppressing all the evidence against Sanabria, no appeal was taken, and the judgment in his favor became res judicata. The issue in *Sanabria* was whether the government could reindict and retry Sanabria when an intervening decision of the court of appeals showed that the court had erred in rejecting the theory that had

As noted above, there is no apparent reason why an erroneous legal ruling on insufficiency should be treated differently from any other legal error, and hence an order sustaining a demurrer ought to be appealable under *Scott*. It is clear that such a ruling is not equivalent to an acquittal by the factfinder, else it would not be appealable even when entered after verdict, and there is no apparent reason why it should become unreviewable when it occurs during the trial. See generally Westen, *supra*, 78 Mich. L. Rev. at 1064 n. 221. The opinion in *Martin Linen* does not address the reasons for equating an acquittal by the judge with an acquittal by the jury,

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been the basis of the first prosecution. The answer to this question turned on an assessment of the scope of the order entered by the trial court, and this Court concluded that Sanabria could not be retried because he had already been acquitted of the "same offense." In the course of its discussion, the Court noted that the insufficiency ruling on the first theory was "unreviewable" (437 U.S. at 64). That statement is inconsistent with the position we take here, but it was not made in connection with an issue that was before the court. The government never sought to retry Sanabria on the first theory, and the question whether the court's ruling could be appealed never was raised. For a detailed discussion of *Sanabria*, see Westen & Drubel, *supra*, 1978 Sup. Ct. Rev. at 163-168.

In *Fong Foo*, the district court entered what it termed a "judgment of acquittal" after the prosecution had put on three witnesses, but well before the prosecution had begun to introduce the major elements of its case. This order, which the court of appeals' opinion indicates was prompted largely by what the trial court viewed as government misconduct (see *In re United States*, 286 F.2d 556, 559-560 (1st Cir. 1961)) cannot be deemed an acquittal within the meaning of *Scott* and *Martin Linen*. The court could not possibly have made an assessment of the defendants' "factual guilt or innocence" because the prosecution had barely begun to put on its case. Compare *Serfass* v. *United States*, 420 U.S. 377, 389 (1975). The Court's decision in *Fong Foo* reflects the view later set forth more explicitly in *Jenkins* (which also relied on *Fong Foo*, see 420 U.S. at 369; *id.* at 370 (Douglas, J., concurring)) that, except in highly unusual circumstances, any midtrial termination in the defendant's favor bars an appeal that would result in a retrial. Thus, whatever vitality the oft-quoted statement in *Fong Foo* regarding the special treatment accorded to genuine verdicts of acquittal retains, its holding, like *Jenkins*, cannot survive *Scott*.

since it speaks almost exclusively to the government's contention that a retrial was permissible there because a mistrial had already been declared due to a hung jury. The Court simply assumed that a judicial finding of insufficiency rendered in the middle of trial would be unappealable, viewing that proposition as "necessarily concede[d]" (430 U.S. at 574) by the government,[15] and it devoted its discussion to the question whether the appealability of such an order should differ depending on whether it was issued before or after the jury's deliberations.

The Court need not recede from its conclusion that "judgments under Rule 29 are to be treated uniformly" (430 U.S. at 575) in order to reconsider its premise that they cannot be appealed if entered prior to verdict. In addition, the Court relied in part on its assertion that "the judge's authority under Rule 29 is designed to provide additional protection to a defendant by filtering out deficient prosecutions" (430 U.S. at 575), and hence appealability ought not to depend on timing. Subsequent developments have shown that broad application of this premise is unjustified, because it is now established that a post-verdict grant of a Rule 29 motion is appealable (see *United States* v. *DiFrancesco*, 449 U.S. at 130). See Cooper, *Government Appeals in Criminal Cases: The 1978 Decisions*, 81 F.R.D. 539, 542 (1979). In light of *Scott*'s holding that an order granting the defendant's motion for a midtrial termination in his favor may be appealed, the logical force of the decision in *Martin Linen* has been undermined and now rests only on a premise that has never been fully considered by this Court. See Westen & Drubel, *supra*, 1978 Sup. Ct. Rev. at 132. The Court should reaffirm this premise only if it is satisfied that sound grounds exist for treating an erroneous legal rul-

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[15] We find no such concession in the government's brief (see Brief for the United States, No. 76-120, at 12-19), but what is relevant for present purposes is that the Court found no occasion to consider the arguments on the point.

ing of insufficiency differently from other legal rulings erroneously terminating a trial in the defendant's favor.

While the Court has not until now had occasion to re-examine the validity of the underlying premise of *Martin Linen*, one recent decision casts some doubt upon it. In *Tibbs* v. *Florida*, *supra*, the trial court had ordered a new trial following conviction on the ground that the guilty verdict was not supported by the "weight of the evidence." This Court held that *Burks* did not bar a retrial in that situation because the court's finding was not a finding that the prosecution had failed to put on a case that could be credited by a rational factfinder. There is considerable tension between the results of *Tibbs* and *Martin Linen*. On the one hand, there is no bar to a retrial where the trial court *correctly* concludes that a guilty verdict is against the weight of the evidence; on the other hand retrial is barred when the trial court *erroneously* rules that the evidence is insufficient. Although it is difficult to compare these two situations directly, it would appear to be the former that more strongly suggests that retrial carries undue risk of wearing down and convicting an innocent person.

In *Scott*, this Court noted that its initial double jeopardy decisions under the modern version of 18 U.S.C. 3731 were rendered without benefit of the "lessons of experience" (437 U.S. at 101), and consequently the Court overruled one of those early decisions in light of the Court's "vastly increased exposure" (*id.* at 86) to the ramifications of the application of the Double Jeopardy Clause to government appeals. *Martin Linen* does not fit comfortably within the framework of current double jeopardy analysis (see Westen, *supra*, 78 Mich. L. Rev. at 1040 n.146), and the rule it contemplates—giving erroneous judicial findings of insufficiency the same special protection accorded to acquittals by the factfinder—is contrary to the view of many respected commentators.[16] In our view, the holding of *Martin Linen* is logi-

[16] See Westen, *supra*, 78 Mich. L. Rev. at 1005-1023, 1040-1042, 1064-1065; Cooper, *Government Appeals in Criminal Cases: The 1978 Decisions*, 81 F.R.D. 539, 555 (1979); M. Friedland, *Double Jeopardy* 310 (1969); J. Sigler, *Double Jeopardy* 114-115 (1969); Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1 (1960).

cally troublesome, and experience has shown that it has a serious adverse effect on the administration of justice. We urge the Court to reconsider it.[17]

[17] Should the Court adhere to the view of *Martin Linen* that at least some judicial rulings of evidentiary insufficiency ought to be treated like acquittals by the factfinder for double jeopardy purposes, we note that a clarification of the definition of "acquittal" would be most desirable. In order for a judicial ruling to be treated as a double jeopardy acquittal, it should at a minimum reflect a finding by the court that, as a factual matter, the prosecution failed to prove its case. There are cases, however, where the granting of a Rule 29 motion does not in fact reflect any such finding, but rather is based on a legal error collateral to the sufficiency of the evidence.

Rule 29 acquittals or demurrers can fall into one of three basic categories. First, where the court concludes, based on a correct view of the law, that the evidence viewed in the light most favorable to the government is insufficient, it has ruled on a mixed question of law and fact that bears some resemblance to a jury acquittal (though the court's conclusion can still be legally erroneous). Second, where a court enters an "acquittal" on grounds of insufficiency because it disbelieves part of the prosecution's evidence, it has committed a serious legal error in exceeding the scope of its power. Even there, however, the court's error represents a judgment about the strength of the prosecution's case, albeit under an incorrect standard of review. Third, the court's ruling may be grounded in a misinterpretation of the governing law and therefore not in any way represent a judgment that the evidence is insufficient under a correct view of the law.

The most glaring instance of the latter category is where the court misapprehends the elements of the charged offense and therefore holds the evidence insufficient because the prosecution failed to prove a nonexistent element. For example, prosecutions have been lost because the trial court erroneously believed that the prosecution was required to prove that the defendant personally prepared false tax returns in order to convict him of procuring the filing of false returns in violation of 26 U.S.C. 7206(2) (see *United States* v. *Head*, 697 F.2d 1200, 1208 & n.13 (4th Cir. 1982), cert. denied, 462 U.S. 1132 (1983)) or because the trial court erroneously believed that a violation of 18 U.S.C. 922(h) could not be shown if the firearm was no longer moving in commerce at the time of receipt (see *United States* v. *Medeiros*, No. 80-1399 (D. Hawaii Apr. 23, 1981); cf. *Barrett* v. *United States*, 423 U.S. 212 (1976)). See also *Finch* v.

B. There Is No Double Jeopardy Bar To Appeal Of A Midtrial Judicial Ruling Of Insufficiency If A Successful Appeal Would Simply Result In a Resumption Of The First Trial

Even if the Court rejects our argument in Point A and holds that a defendant may not be subjected to a second trial following the entry of an order terminating the first trial on the basis of a judicial finding of insufficient evidence, the grant of the demurrer here is nonetheless appealable because no retrial would be necessitated by a reversal on appeal. The trial court recessed the trial in this case in order to await the outcome of the prosecution's appeal. If the appeal succeeds, the case will be remanded for resumption of the first trial before the same factfinder, not for a second trial.[18] While we ac-

United States, 433 U.S. 676 (1977). Or the court may, as in *Sanabria*, erroneously suppress evidence crucial to the prosecution's case and then find the remaining evidence insufficient. See *United States* v. *Fay*, 553 F.2d 1247 (10th Cir. 1977).

It is not clear whether such rulings are appealable under present law. On the one hand, these rulings appear to fall within one of the *Martin Linen/Scott* definitions of an acquittal (see page 19, *supra*) because the court ultimately resolves the case on the basis of a conclusion that guilt has not been established by the evidence. On the other hand, they arguably do not meet another of the definitions because the court has not truly resolved in the defendant's favor "'some or all of the factual elements of the offense charged'" (*Scott*, 437 U.S. at 97, quoting *Martin Linen*, 430 U.S. at 571). What we believe *is* clear is that there is no conceivable justification for treating such rulings as acquittals for double jeopardy purposes. Certainly when neither the factfinder nor the court has concluded that, under a proper view of the law, the prosecution has failed to prove its case, it is inappropriate to apply the special protection accorded to acquittals to insulate the court's error from appellate review. The principles of *Scott* plainly justify an appeal in that situation (as long as the midtrial termination is at the defendant's behest), and the definition of "acquittal" ought to be clarified accordingly.

[18] Even if the trial had not been formally recessed, it is arguable that the proceedings required on remand should be considered a resumption of the first trial, rather than a second trial, since this is a bench trial and the proceedings would take place before the same factfinder who participated in the earlier proceedings. Cf.

knowledge that there may be substantial problems in this particular case with simply resuming the trial after the passage of so much time, these are not double jeopardy problems, and they exist equally with respect to the counts on which the demurrers were rejected as to those on which they were upheld. As far as the Double Jeopardy Clause is concerned, and therefore as far as the issue before this Court is concerned, this case is indistinguishable from *United States* v. *Ellison*, *supra*, in which the government sought a writ of mandamus while the trial was recessed over a weekend, in an effort to compel the district court to vacate its order granting a Rule 29 motion. Accordingly, while the issue of permissibility of midtrial correction of an erroneous Rule 29 determination (or its state equivalent) arises here in a peculiar posture, it is an important one that could have broad implications for the administration of justice.[19]

In *Ellison*, at the close of the government's case in an exceptionally important fraud prosecution, the trial court

Jenkins, 420 U.S. at 368-370 (rejecting this argument), overruled, *Scott*, 437 U.S. at 87, 101. Because there is no doubt here that the first trial has been continued, however, this issue is not presented in this case.

[19] If there is no double jeopardy bar to the correction of an erroneous granting of a Rule 29 motion while the trial is still in progress, the legislature can decide whether to take steps to facilitate such corrections. For example, if Congress decides that the problem is sufficiently important, it could amend Rule 29 to allow for expedited review of insufficiency rulings. Alternatively, it could allow for limited review on an expedited basis of such orders with the court of appeals' function restricted to deciding whether there is sufficient doubt about the correctness of the trial court's termination of the trial to warrant ordering the completion of the trial and postponement of the trial court's Rule 29 ruling until after verdict—the course of action that this Court has identified as preferable in most cases. See *Scott*, 437 U.S. at 100 n.13; *United States* v. *Ceccolini*, 435 U.S. 268, 271 (1978). On the other hand, if there is a constitutional bar to such review, the legislature's latitude for action is more limited. It is conceivable that if it is unwilling to live with a significant number of erroneous midtrial terminations, thus allowing some guilty defendants to go free, the legislature might decide to eliminate entirely the defendant's right to seek a midtrial termination, although the defendant has a legitimate interest in such relief in many cases (see *Scott*, 437 U.S. at 100 n.13).

granted the defendants' Rule 29 motions for judgments of acquittal with respect to most of the charges pending against them, on grounds that the court of appeals found difficult to understand. Before the trial on the remaining counts was resumed, a panel of the court of appeals, by a 2-1 vote, granted a writ of mandamus and set aside the trial court's order, without prejudice to reinstatement following verdict. The panel stated that there was no double jeopardy problem with this action because no successive trials were involved, the jury having not yet been discharged. 684 F.2d 664. The next day, the en banc court vacated the panel decision and held that resumption of the trial on these counts would violate double jeopardy. 722 F.2d 595. The reasoning of the en banc court presumably was that expressed by Judge McWilliams in his dissent from the panel opinion. He concluded that the reinstatement of the charges once the court had entered a judgment of acquittal on insufficient evidence grounds was "a form of 'second trial' " and therefore barred under *Martin Linen*. 684 F.2d at 667. This conclusion does not withstand analysis.

The Double Jeopardy Clause protects a defendant from being *twice* placed in jeopardy for the same offense. It is not apparent why a single trial should violate this prohibition just because, during the course of the trial, the trial court had erroneously ruled that the evidence was insufficient and was promptly corrected by the appellate court. If the trial court entered such a ruling and then reconsidered and vacated its order itself before the jury was discharged, it could hardly be thought that the Double Jeopardy Clause would prevent the trial from proceeding to its conclusion. See *Sanabria* v. *United States*, 437 U.S. 54, 59-60 (1978). There is no reason why the intervention of an appellate court should convert the continuation of the trial into a second jeopardy.

In *Swisher* v. *Brady*, 438 U.S. 204 (1978), the Court considered the validity of a system of state juvenile court adjudications in which a hearing is held before a master who makes findings and recommendations. This Court held that a reversal by a judge, upon appeal by the state,

of a master's finding of not guilty does not violate the Double Jeopardy Clause. The Court explained that the appeal to the judge following a not guilty determination did not place the defendant twice in jeopardy because it was all part of a single proceeding. *Id.* at 215. The Court emphasized that the state procedure at issue in *Swisher* did not impinge on the policies of the Double Jeopardy Clause because it did not allow the prosecution a "second crack" at supplying evidence that it failed to muster in the first proceeding. *Id.* at 215-216. The permissibility of continuing with a trial after an erroneous demurrer has been reversed follows *a fortiori* from *Swisher*. The defendant is subjected to only one trial and the prosecution is given no opportunity to improve its case; the original trial simply proceeds to its conclusion. Moreover, here, unlike *Swisher*, there has not been any *factual* determination with respect to guilt or innocence; the function of the master in *Swisher* was to make factual findings, but the presiding judge in this case was simply making a ruling of law.

The fact that the finding of evidentiary insufficiency was made here by the trial court does not suggest a different result. This Court has already held in *Serfass* v. *United States*, 420 U.S. 377 (1975), that there is no bar to trial proceedings following an "acquittal" entailing a judicial finding of insufficiency. There, the trial court dismissed the indictment prior to trial because it found from documents submitted prior to trial that one of the elements of the offense could not be established. While this ruling was undoubtedly an "acquittal" in the same sense as the sustaining of the demurrers here, the Court held that a trial following reversal on appeal would not be barred because it would be a permissible first jeopardy, not an impermissible second jeopardy. The same is true here; the proceedings following a reversal of the grant of the demurrers would be a continuation of the first jeopardy.

It is no response to this analysis to maintain that the defendant has some indefeasible right to the benefit of the court's ruling in his favor concerning the sufficiency

of the evidence. It is well established by now that a post-verdict judicial finding of insufficiency may be reversed on appeal and a guilty verdict reinstated.[20] If the defendant has no right to retain the benefit of that ruling, he has no right to retain the benefit of the same ruling made midtrial, if the trial can be resumed and results in a valid guilty verdict by the factfinder. In sum, the Double Jeopardy Clause does not bar reversal of an erroneous midtrial judicial finding of insufficient evidence as long as that error can be corrected before the trial is terminated, and thus without placing the defendant in jeopardy a second time.

CONCLUSION

The petition for a writ of certiorari should be dismissed for lack of jurisdiction. Alternatively, the judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted.

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[20] In addition to this Court's statement in *DiFrancesco*, 449 U.S. at 130, and the unanimous court of appeals' decisions cited above (see page 12, *supra*), we note that this Court's decision in *Wilson* plainly stands for this proposition. In *Wilson*, this Court approved the reversal on appeal of a post-verdict resolution in the defendant's favor on preindictment delay grounds. It is now clear in light of *Scott* that the order in *Wilson* was not an "acquittal," but the Court in *Wilson* expressly stated that it was unnecessary to decide there whether the order was an "acquittal" or not (420 U.S. at 336). Thus, *Wilson* stands for the proposition that a post-guilty-verdict acquittal is appealable.

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